142-547

142-547

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1017.~~ 1026

CHARLES COUNSELMAN, APPELLANT,

vs.

FRANK HITCHCOCK, MARSHAL OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 14, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1617.

CHARLES COUNSELMAN, APPELLANT,

vs.

FRANK HITCHCOCK, MARSHAL OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 **Pleas** in the Circuit court of the United States of America for the Northern District of Illinois, held at the United States court rooms in the city of Chicago in the district aforesaid before the Hon. Walter Q. Gresham, judge of the Circuit court of the United States for the Seventh Judicial Circuit on Thursday, the eighteenth day of December, in the December term of said court in the year of our Lord, one thousand eight hundred and ninety and of our Independence the one hundred and fifteenth year.

WM. H. BRADLEY,
Clerk.

In the matter of the petition of Charles Counselman for a writ of *habeas corpus*.

NORTHERN DISTRICT OF ILLINOIS. ss.

Be it remembered that on the twenty-sixth day of November, 1890, came the petitioner, Charles Counselman, by his attorney and filed in the office of the clerk of the Circuit court of the United States for the Northern district of Illinois at Chicago in said district, his bond for costs and petition for a writ of *habeas corpus* in said above entitled cause, which said bond and petition are respectively in the words and figures following, to wit:

2 BOND FOR COSTS.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, ss.
NORTHERN DIVISION.

CIRCUIT COURT, October Term, A. D. 1890.

In re Charles Counselman, petition for *habeas corpus*.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the petitioner of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him. Dated this 26th day of November, A. D. 1890.

JNO. N. JEWETT.

(Endorsed): Filed Nov. 26, A. D. 1890.

WM. H. BRADLEY,
Clerk.

3 IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

To the Honorable Walter Q. Gresham, Judge of the said Circuit court:

Your petitioner, Charles Counselman, respectfully shows unto your Honor that he is a citizen of the State of Illinois, residing in the said Northern district thereof, and that he is unlawfully held in custody by Frank Hitchcock, the marshal of the United States for the Northern district of Illinois, and is unlawfully confined and deprived of his liberty.

Your petitioner further represents and shows unto your Honor that he was served to wit: on or about the 20th day of November, A. D. 1890, with a subpoena issuing out of the District court of the United States for the Northern district of Illinois, of the Northern division thereof, directing and commanding him to appear before the grand jury, and to testify before the said grand jury.

Your petitioner further represents and shows unto your Honor that in obedience to said subpoena he appeared before the said grand jury, and that he was then and there interrogated and questioned by the said grand jury, and certain questions were addressed to him which he then and there declined to answer on the ground stated by him, that his answers to such questions would tend to incriminate him, which said several questions so submitted to him

4 by the said grand jury and which he refused to answer as aforesaid, are more particularly and fully stated and set out hereinafter in the copy which is herein set forth of the report made by the said grand jury to the said District court of the refusal of your petitioner to answer the said questions.

Your petitioner further shows that thereupon the said grand jury made their report and certified to the said District court the several questions submitted by the said grand jury to your petitioner and his refusal to answer the same, which report was filed in the said District court on the 22d day of November, 1890, but was and is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } sct.
NORTHERN DIVISION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

To the October adjourned term, A. D. 1890.

To the Honorable Henry W. Blodgett, Judge of said court:

The grand jurors in attendance upon said court respectfully report and present to the court, that on the 21st day of November, A. D. 1890, they, the grand jury, were engaged in investigating and enquiring into certain alleged violations in the district and division aforesaid, of an act of Congress entitled "An Act to regulate commerce," approved and in force February 4th, A. D. 1887, and the amendments thereto approved and in force March 2d, A. D. 1889, by the officers and agents of the Chicago, Rock Island and Pacific Railway Company, and by the officers and agents of the Chicago, St. Paul & Kansas City Railway Company, and by the officers and agents of the Chicago, Burlington & Quincy Railroad Company, and the officers and agents of various other railroad companies having lines of road in said district and division. That on the day aforesaid, one Charles Counselman, appeared before the grand jury in response to a subpœna served upon hin, and after having been duly sworn, testified as follows:

Q. Your name is Charles Counselman?

A. Yes, sir.

Q. You are the sole member of Charles Counselman & Co?

A. Yes, sir.

Q. Engaged in the grain and commission business in the city of Chicago?

A. Yes, sir.

Q. Have you been a receiver of grain from the west during the past two years?

A. Yes, sir.

Q. Over what roads did you ship grain received by you during the present summer of 1890?

A. The Rock Island and Burlington, principally.

Q. From what states was most of the grain shipped?

A. From Kansas and Nebraska, I think.

Q. What did your receipts in bushels amount to of corn in the months of May, June and July, 1890?

A. I have no idea, I could not tell you.

Q. Five hundred thousand bushels a month?

A. I cannot tell you.

Q. How many men have you employed during the last year? What is the usual number of men employed in connection with yonr business?

6 A. I have, I think, six or seven men in my office.

Q. Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago, from points outside of this state, less than the tariff or open rate?

A. That I decline to answer, Mr. Milchrist, on the ground that it might tend to criminate me.

Q. During the past year have you received rates upon the Chicage, Rock Island & Pacific from points outside of the state to the city of Chicago, at less than the tariff rates?

A. That I decline to answer on the same ground.

Q. I will ask you the same question with reference to the Burlington.

A. I answer in the same way.

Q. The same with reference to Atchinson?

A. I can't recollect that we have done any business with that road.

Q. I will ask you whether you have during the last year received a rate less than the tariff rate on what is called the "Diagonal" or Stickney road?

A. Not to my knowledge.

Q. Who attends to the freight department of your business?

A. Myself and Mr. Martin.

Q. Have you or the firm of Charles Counselman & Co. received any rebate, drawback or commission from the Chicago, Rock Island and Pacific Railroad Company, or the Chicago, Burlington and Quincy Railroad Company, on the transportation of grain from points in the States of Nebraska and Kansas, to the city of Chicago, in the State of Illinois, during the past year whereby you se-

7 cured the transportation of said grain at less than the tariff rates established by said railroad?

A. I decline to answer on the same ground.

The grand jurors aforesaid, do therefore, hereby certify to the court the questions submitted to said Charles Counselman and his refusal to answer the same, and ask the direction and judgment of the court in the premises.

(Signed) JOHN W. CHERRY, *Foreman.*

W. H. HEALY, *Clerk.*

That thereupon your petitioner was ruled by the judge of the said District court to show cause why he should not answer the said questions so submitted to him by the said grand jury and reported by them to the court, and that a hearing was then and there had, and that thereafter, to wit: on the 25th day of November, A. D. 1890, it was ordered and ruled by the judge of said District court that your petitioner answer the said several questions submitted to him by the said grand jury, and each thereof, together with such further questions touching the matter under inquiry as should be propounded to him, which said order was in the words following, to wit:

In re CHARLES COUNSELMAN:

The said defendant having appeared in court as required by the order entered on the 22d inst., and showed cause why he should not answer the questions propounded to him by the grand jury, and the court having heard the arguments of counsel and being now fully advised in the premises, doth find that the excuses and
8 reasons advanced on behalf of the respondent as to why he should not answer said questions are wholly insufficient.

It is therefore ordered that said respondent appear without delay before the grand jury and there make answer to the questions stated to have been propounded to him by the grand jury in their report heretofore presented to the court, and that he also answer such further questions touching the matter under inquiry by the grand jury and which shall be pertinent to such inquiry as shall be propounded to him by any member of the grand jury or the district attorney or any of his assistants.

That thereupon your petitioner was again called before the said grand jury and the said questions, together with other kindred questions, were submitted to him to answer, and your petitioner then and there refused to answer the said questions so submitted by said grand jury and each thereof, for the same reasons, which said questions and the refusal of your petitioner to answer the same are shown by the report of the grand jury then made thereof to the said District court, which report is in the words following, to wit:

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.
NORTHERN DIVISION.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, OCTOBER ADJOURNED TERM, A. D. 1890.

9 *To the Honorable Henry W. Blodgett, Judge of said Court:*

The grand jurors in attendance upon said court respectfully report that on this day they were in session and engaged in investigating and inquiring into certain alleged violations of an act of Congress entitled "An Act to regulate Commerce, approved and in force February 4, 1887," and the amendments thereto approved and in force March 2, 1889, by the officers and agents of the Chicago, Rock Island & Pacific Railway Company, and by the officers and agents of the Chicago, Burlington and Quincy Railroad Company, and by the officers and agents of the Chicago, St. Paul & Kansas City Railway Company, and the officers and agents of various other railroad companies having lines of road in said district and division. That in response to the order of the said Honorable Court heretofore on this day entered, requiring him to appear before this grand jury and answer certain questions, one Charles Counselman, being the same Charles Counselman mentioned in the former report of this jury filed in the said court on the 22d day of November, 1890, appeared before this grand jury and thereupon there were propounded to the said Charles Counselman the same questions by the district attorney, which are set out in the said former report of this grand jury, filed and presented in the said court on the said 22d day of November, A. D. 1890, and thereupon, the said Charles Counselman still refused and persisted in his refusal to answer the questions which he had refused to answer upon the 21st day of November, A. D. 1890, which questions, answers and refusals are set out in said former report of this jury, and upon the same grounds.

And thereupon there were propounded to the said Charles
10 Counselman by the district attorney and the grand jury, additional questions, which said additional questions and the answers thereto are as follows:

10 Q. Do you know whether or not the Chicago, Rock Island & Pacific Railroad Company transported for any person, company, or corporation in the City of Chicago, during the year last past, grain from any point in the States of Nebraska, Kansas or Iowa, to the City of Chicago, in the State of Illinois, for less than

the established rates in force on such road at the time of such transportation?

A. I decline to answer, on the ground that my answer might tend to criminate me.

Q. Do you know any person, corporation, or company who has obtained their transportation of grain from points or places in the States of Iowa, Nebraska, or Kansas, to the City of Chicago, over the Chicago, Rock Island & Pacific Railroad during the past year, at a rate and price less than the published and legal tariff rate at the time of such shipment?

A. I decline to answer for the reason that my answer might tend to criminate me.

Q. Do you know whether the Chicago, Rock Island & Pacific Railroad Company within the past year, has charged, demanded, or received from any person, company, or corporation in the City of Chicago, any less rate than the open rate, or rate established by said railroad company, on grain or other property transported by the said railroad company from points in the States of Nebraska, Kansas and Iowa, to the City of Chicago, in the State of Illinois? If you have such knowledge, give the name of such shipper of
11 whom said rate was charged, demanded or received, and the amount of such rate and shipments, stating fully all the particulars within your knowledge?

A. I decline to answer, for the reason that my answer might tend to criminate me.

Q. Do you know whether the Chicago, Rock Island & Pacific Railroad Company, during the year A. D. 1890, has paid to any shipper at the City of Chicago, any rebate, refund, or commission on property and grain transported by such company from points in the State of Kansas, Nebraska, or Iowa, whereby such shipper obtained the transportation of such grain or property, from the said points in said states to the City of Chicago, in the State of Illinois, at a less rate than the open or tariff rate, or the rate established by said company? If you have such knowledge, state the amount of such rebates, drawbacks. or commissions paid, to whom paid, the date of the same, and on what shipments; and state fully all the particulars within your knowledge relating to such transaction or transactions?

A. I decline to answer, for the reason that my answer might tend to criminate me.

All of which the grand jury respectfully submitted.

JOHN W. CHERRY,
Foreman Grand Jury.

W. H. HEALY,
Clerk Grand Jury.

12 Your petitioner further represents and shows unto your Honor that thereupon, to wit: on the 25th day of November, 1890, the Judge of said District court entered an order, which is in the words and figures following, to wit:

In re CHARLES COUNSELMAN.

Now come into court the grand jury heretofore impaneled, and yet in session, and report and make known in writing to the court that the said Charles Counselman on this day appeared before the grand jury, then in sesson in the grand jury room, in compliance with the order heretofore on this day entered and on the questions set out in the report that the grand jury to the court made on the 22d day of the present month, being again propounded to him, refused to answer the same on the ground that by such answers he might criminate himself, and on other questions set out in the report now made by the grand jury being propounded to said Counselman, pertinent to the matters under inquiry by the jury, said Counselman refused to answer the same for the reason that by his answers he might criminate himself.

And the said Charles Counselman being now present in court and persisting in his said refusal to answer said questions, the court doth adjudge him to be in contempt of this court, and doth order and adjudge that he be fined in the sum of five hundred dollars, and that he pay the costs of this proceeding, and that he be now taken into custody by the marshal of the United States for this district and held in such custody until he shall have answered said questions
13 and all questions of similar import, which shall be propounded to him by the grand jury or the district attorney or any assistant district attorney in the presence of such jury, and such fine and costs are paid.

That under and in pursuance of said order, and under no other authority or order, the marshal of the said District court then and there took your petitioner into custody and has retained and now holds your petitioner in his custody and has restrained and now restrains him from his due and lawful liberty.

Your petitioner further represents and shows unto your Honor that the said grand jury had no jurisdiction or authority to enter upon and prosecute the said investigation which was then and there being made by them in the manner and form stated by them in their said report to the said District court, and that they had no jurisdiction or authority to submit to your petitioner the said several questions so submitted by them to him.

Your petitioner further represents and shows that his answers to the said several questions submitted by the said grand jury to him

and which he refused to answer, as aforesaid, and each thereof, would tend to incriminate him, and that by compelling him to answer the said questions and each thereof, he would be compelled to be a witness against himself in the said criminal proceeding and investigation then and there pending before the said grand jury, and in any criminal proceedings which might be brought as a result of the said investigations, contrary to the provision of the constitution of the United States and especially the fourth and fifth amendments thereof, and that the said District court had no jurisdiction or authority to compel your petitioner to answer the said questions
14 and each thereof, and that its order directing and commanding your petitioner to answer the said several questions and each thereof was contrary to the provision of the constitution of the United States and the laws thereof, and void, and that the said District court had no jurisdiction or authority to order and adjudge that your petitioner was in contempt of said court for refusing to answer the said several questions and each thereof, and for refusing to comply with its said order, and that the said order imposing a fine upon your petitioner and committing him as aforesaid, to the custody of the said marshal was unconstitutional and void, and that your petitioner is now held in custody by the marshal of the said court without legal right and authority, and contrary to the constitution of the United States and the laws thereof.

Wherefore your petitioner prays that a writ of *habeas corpus* do issue from this court, directed to Frank Hitchcock, marshal of the said United States District court for the Northern district of Illinois, Northern division thereof, commanding him on a day certain therein to be named, to bring before this court the body of your petitioner, together with the cause of his detention, and to abide by such further orders as your Honor and this court may direct.

15 And your petitioner further prays that the said several orders of the said District court and the fine and the order committing him to custody aforesaid may be adjudged and ordered by this court to be null and void, and that your petitioner may be released and discharged from the custody in which he is now held by color of the said order of the said District court.

And your petitioner will ever pray, etc.

CHAS. COUNSELMAN.

JNO. N. JEWETT,
Of Counsel for Petitioner.

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

Charles Counselman, being duly sworn, says that he is the petitioner in the foregoing petition and that he has read the same and knows the contents thereof, and that the matters and things in said petition stated are true in substance and fact.

CHAS. COUNSELMAN.

Subscribed and sworn to before me this 25th day of November, A. D. 1890.

LEMUEL H. FOSTER,
Notary Public, Cook Co., Ill. [SEAL.]

(Endorsed): Filed November 26, 1890.

WM. H. BRADLEY,
Clerk.

16 On the same day, to wit: On the twenty-sixth day of November, in the adjourned October term of said court 1890, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, Circuit Judge, is the following entry, to wit:

ORDER.

In the matter of the petition of Charles Counselman for a writ of *habeas corpus* }

Now comes said petitioner Charles Counselman, by John N. Jewett, Esq., his attorney and files his petition praying for a writ of *habeas corpus* to issue to the marshal of this district to produce in court the body of said petitioner, and on motion of said attorney it is ordered that a writ of *habeas corpus* issue, as prayed in said petition, and that the same be made returnable forthwith.

On the same day, to wit: On the twenty-sixth day of November, 1890, a writ of *habeas corpus* issued out of said court in said entitled cause, which said writ together with the return of the marshal thereto attached are in the words and figures following to wit:

17 CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

THE UNITED STATES OF AMERICA.

To Frank Hitchcock, United States Marshal for said District, Greeting:

We command you that you do without excuse or delay, bring or cause to be brought before the Circuit court of the United States of America, for the Northern district of Illinois, now sitting in the court room of said Circuit court, in the city of Chicago, in said district. the body of Charles Counselman, by whatever name or addition he is known or called, and who is unlawfully detained in your custody as it is said, together with the day and cause of his caption and detention then and there to perform and abide such order and direction as our said Circuit court shall make in that behalf.

Hereof make due return under the penalty of what the law directs.

To the marshal of the Northern district of Illinois, to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme court of the United States of America at Chicago, aforesaid, this 26th day of November, in the year of our Lord one thousand eight hundred and ninety, and of our independence the 115th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed): Writ of Habeas Corpus, Returnable forthwith. Wm. H. Bradley, Clerk.

JOHN N. JEWETT,
Atty. for Petitioner.

18 IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA, NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS.

To the Honorable, the Circuit Court of the United States for the Northern District of Illinois, Northern Division:

I, Frank Hitchcock, Marshal of the United States for the Northern district of Illinois, hereby certify and return that before the coming to me of the annexed writ of *hnbeas corpus*, the said Charles Counselman was committed to my custody and is detained by me under and by virtue of an order and judgment of the District court of the United States in and for the Northern Division of the Northern District of Illinois, a copy of which said order and

judgment is hereto attached, and I further certify and return that the fine and costs imposed by such order and judgment have not been paid, and that I hold said Counselman in my custody for that default, as commanded by such order and judgment, nevertheless, I have the body of the said Counselman before this Honorable Court.

FRANK HITCHCOCK,
United States Marshal.

19 DISTRICT COURT OF THE UNITED STATES OF AMERICA—
NORTHERN DIVISION OF THE NORTHERN
DISTRICT OF ILLINOIS.

TUESDAY, November 25, 1890.

Present: The Hon. Henry W. Blodgett, Judge.

In the matter of Charles Counselman.

Now comes into court the grand jury heretofore empaneled and yet in session, and report and make known in writing to the court, that the said Charles Counselman this day appeared before the grand jury then in session in the grand jury room, in compliance with the order heretofore on this day entered, and on the questions set out in the report of the grand jury to the court made on the twenty-second day of the present month being again propounded to him, refused to answer the same on the ground that by such answers he might criminate himself, and on other questions set out in the report now made by the grand jury, being propounded to said Counselman pertinent to the matter under enquiry by the jury, said Counselman refused to answer the same for the reason that by his answers he might criminate himself.

And the said Charles Counselman being now present in court and persisting in his said refusal to answer said questions, the court doth adjudge him to be in contempt of the court, and doth order and adjudge that he be fined in the sum of five hundred dollars, and that he pay the costs of this proceeding, and that he be now taken into custody by the marshal of the United States for this district, and held in said custody until he shall have answered said questions
20 and all questions of similar import, which shall be propounded to him by the grand jury or the district attorney, or any assistant district attorney in the presence of such jury, and such fine and costs are paid.

NORTHERN DISTRICT OF ILLINOIS—ss.

I, William H. Bradley, clerk of the District court of the United States, for the Northern Division of the Northern District of

Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court at Chicago, in the Northern Division of said District on the 25th day of November, A. D. 1890, in the matter of Charles Counselman, a witness in contempt, as the same appears from the original record of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 25th day of November, A. D. 1890.

[SEAL.] WM. H. BRADLEY,
Clerk.

(Endorsed): Filed Nov. 28, 1890.
WM. H. BRADLEY,
Clerk.

21 Afterward, to wit: On the twenty-eighth day of November, 1890, came the petitioner by his attorney and filed in said clerk's office his motion to be discharged in said entitled cause, which said motion is in the words and figures following to wit:

MOTION TO DISCHARGE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION. OF THE OCTOBER TERM, A. D. 1890.

In the Matter of Charles Counselman. } *Habeas Corpus.*

And now comes the said Charles Counselman in person and moves the court, upon his petition and the return of the marshal to the writ of *habeas corpus* heretofore issued thereon, and the facts appearing in said petition and return, that he be discharged from the arrest, confinement and imprisonment in which he is held under and by virtue of the order of the District Court of the United States for the said Northern district and division in accordance with the prayer of his said petition.

CHARLES COUNSELMAN,
By JNO. N. JEWETT,
His Attorney.

(Endorsed): Filed Nov. 28, 1890.
WM. H. BRADLEY,
Clerk.

22 On the same day, to wit: On the twenty-eighth day of November, in the adjourned October term of said court, 1890, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, Circuit Judge, is the following entry, to wit:

ORDER.

In the Matter of the Petition of Charles Counselman for a writ of *habeas corpus*.

Now comes said petitioner by John N. Jewett, Esq., his attorney, and the District Attorney and his Associate Counsel, and, as commanded by the writ of *habeas corpus* heretofore issued herein and directed to the United States Marshal for this district, said marshal now produces in court the body of said petitioner, Charles Counselman, and files said writ and his return thereto, and this matter now comes on to be heard upon said petition and said return of the marshal to said writ, and after hearing the same and the arguments of the counsel the court takes the same under advisement.

23 Afterward, to wit: on the eighteenth day of December, 1890, there was filed in said clerk's office, the opinion of Judge Gresham, in said entitled cause, which said opinion is in the words and figures following, to wit:

OPINION,

IN THE U. S. CIRCUIT COURT, N. D. OF ILLINOIS.

Decision rendered December 11, 1890.

In re CHARLES COUNSELMAN.

Gresham, J.. On the twentieth day of November, 1890, the grand jury for the Northern district of Illinois, was engaged in investigating alleged violations of the Inter-State Commerce law by the officers and agents of the Chicago, Rock Island & Pacific Railway Company, the officers and agents of the Chicago, St. Paul & Kansas City Railway Company, and the officers and agents of the Chicago, Burlington & Quincy Railroad Company, and in obedience to a subpœna served on him, Charles Counselman, a commission merchant of Chicago, engaged in shipping grain from points west

of Illinois to the city of Chicago, over all or some of the roads named, appeared and was sworn as a witness.

After testifying that during the summer of 1890, he had re-
24 ceived grain over the Rock Island and Burlington roads, he refused to answer the following questions propounded to him by the grand jury for the reason that his answers would tend to criminate him:

"Have you during the last year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the roads coming to Chicago, from points outside of this state, less than the tariff or open rate?"

"During the last year have you received rates upon the Chicago, Rock Island & Pacific and the Burlington from points outside of the state to the city of Chicago at less than the tariff rates?"

"Have you or the firm of Charles Counselman & Co., received any rebate, drawback or commission from the Chicago, Rock Island & Pacific Railway Company, or the Chicago, Burlington & Quincy Railroad Company on the transportation of grain from points in the States of Nebraska and Kansas to the city of Chicago in the State of Illinois, during the last year whereby you secured transportation of grain at less than the tariff rate established by said railroads?"

November 22, 1890, the grand jury appeared in the District court and informed it in writing of the questions which had been submitted to Counselman, and of his refusal to answer the same, and asked the direction of the court in the premises.

The court at once entered an order requiring Counselman to show cause why he should not answer the questions. Counsel-
25 man appeared by counsel and after argument, the court ordered that the witness appear without delay before the grand jury and make full answers to the questions which he had refused to answer.

November 25th, the grand jury again appeared in open court and filed a written report showing that the questions had been repeated to Counselman and that he had refused to answer them, giving the same reason therefor, he had given in the first instance, and being present in court and still persisting in his refusal to answer, it was adjudged that he was in contempt, that he be fined five hundred dollars, and held in the custody of the marshal until he pay the fine, and make full answers before the grand jury to the questions. The marshal took Counselman into custody after which he filed his petition before this court, alleging that the action of the grand jury and the District court was unauthorized and void and praying that a writ of *habeas corpus* be issued, directed to the mar-

shal requiring him to bring the petitioner before this court, and that he be discharged from arrest.

In his return the marshal set up the order of the District court as his authority for depriving the petitioner of his liberty.

The fourth amendment to the constitution of the United States declares that the people shall be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and the fifth amendment declares that no person shall be compelled in any criminal case to be a witness against himself. It was urged in behalf of Counselman that the questions which he refused to answer violated the privilege secured to him by these amendments.

26 By the Inter-State Commerce Law it is made a criminal offense, punishable by fine and imprisonment, for any officer or agent of a railroad company to grant any shippers of merchandise from one state to another, and for any such shipper to contract for or receive, a rate less than the tariff or open rate. Shippers as well as well as the officers, agents and employes of corporations engaged in the carrying business between states, are made subject to the penalties of the statute.

Section 860 of the Revised Statutes of the United States declares that no pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against him or his property or his estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture.

Under the fifth amendment a person cannot be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution, or his property to forfeiture.

If, however, there be a statute which declares that the testimony of a witness in a case or proceeding shall never be repeated against him or his property in any other case or proceeding, there is no necessity for claiming the privilege secured by the amendment. If the protection of section 860 is co-extensive with that of the constitution, a witness is entitled to no privilege under the latter.

27 In effect Counselman says: If I should answer the questions it would appear that I have violated the Inter-State Commerce Law, and my admissions might be offered against me hereafter.

The sufficient answer to that position is: Should he hereafter be prosecuted for the offense, section 860 would not permit his admissions to be proved against him.

The privilege cannot be claimed when it appears that the witness has been acquitted or convicted of the offense about which he is asked to testify, that he has been pardoned for it, or that it has been

barred by lapse of time, and should Counselman answer the questions which he refused to answer, his disclosures could never be used against him or his property in any subsequent proceeding.

Boyd v. *The United States*, 116 U. S., 618, is relied on as justifying Counselman in his attitude before the grand jury. That was an information against thirty-five cases of plate glass, which had been seized as forfeited to the United States for fraud against the custom laws.

The penalty prescribed by the section under which the seizure was made, was fine and imprisonment, and forfeiture of the merchandise fraudulently entered. The information charged that the alleged fraud was committed by the owner of the goods, the owner entered a claim for the goods, and in his answer denied that they had become forfeited.

It became necessary to show the quantity and quality of twenty-nine cases of plate glass previously imported by the owner, and for the purpose of doing that, the district attorney offered in evidence an order which he had obtained from the district judge requir-
28 ing the claimant to produce the invoice of the twenty-nine cases. The owner obeyed the order under protest, insisting that he could not be required to furnish evidence against himself, and that the statute under which the district attorney had obtained the order, was in violation of the fourth and fifth amendments to the constitution. The invoice was read in evidence and there was a verdict and judgment of forfeiture against the property. The statute under which the District court entered the order for the production of the invoice, declared that if a defendant or claimant failed or refused to produce any book, invoice or paper in obedience to an order of the court, for its production, the allegations contained in the petition for the order should be taken as confessed.

The Supreme court held that although the proceeding was in form one against the property, it was in effect against the owner for its forfeiture and that the order of the District court and the statute under which it was made, were both in violation of the fourth and fifth amendments.

This case is clearly distinguishable from the Counselman case. In the former case, the owner was treated as the defendant, and he was required to produce evidence upon which a judgment of forfeiture might be entered against his own goods. Counselman refused to testify in the proceeding before the grand jury to obtain evidence, not upon which he might be indicted, but upon which others might be indicted.

29 It is further urged in behalf of Counselman, that should he testify before the grand jury in obedience to the order of the

District court, he might disclose facts and circumstances which, although immaterial in themselves, would open up sources of information to the government, whereby it might obtain evidence not otherwise obtainable to secure his conviction, and that, therefore, the immunity secured by Sec. 860, is not equal to the protection of the fifth amendment.

That amendment was adopted, not to shield men from the consequences of their crimes, but that they might not be obliged to furnish evidence of their own guilt. And when the disclosures of a witness, however guilty they may show him to be, can never be repeated in any subsequent proceeding against him or his property, he is as fully protected as the Constitution intended he should be.

If, through threats of violence, a man confesses he has committed murder, and states who was present at the time, and where the weapon and the dead body may be found, and he is afterward put on trial for the offense, he cannot be confronted with his confession, but the person who saw the crime committed is a competent witness, although the prosecutor might never have known there was such a witness but for the confession, and it may be shown by others that the weapon and dead body were found where the defendant said they could be found. The writ is discharged, and the petitioner is remanded to the custody of the marshal.

(Endorsed): Filed December 18, 1890.

WM. H. BRADLEY, *Clerk*.

30 On the same day, to wit: on the eighteenth day of December, in the December term of said court, 1890, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, Circuit Judge, is the following entry, to wit:

FINAL ORDER.

In the matter of the Petition of Charles Counselman for a writ of *habeas corpus*.

This cause having come on to be heard upon the motion of the said petitioner, Charles Counselman, to be released and discharged from the arrest, confinement and imprisonment in which he is held by the marshal of the United States for the Northern District of Illinois, under and by virtue of the order of the District court of the United States for the said Northern District and Division under the facts and conditions set forth in the petition of said Counselman, and the return of the marshal to the writ of *habeas corpus* issued

thereon, admitted to be true; and the court having read and considered the said petition and return to the said writ, and having heard the arguments of counsel upon said motion, in behalf of the said petitioner and also on behalf of the United States, and being now fully advised in the premises, it is considered and adjudged by the court that under the facts and conditions set forth in the said petition and the return of the marshal to said writ of *habeas*
31 *corpus*, which were admitted by the respective parties to be true, the District court aforesaid, was in the exercise of its rightful authority in the making and entering of the order and judgment against the said petitioner set out in the petitioner's said petition, and in the return of the marshal to said writ of *habeas corpus* aforesaid, and that said order and judgment were lawfully made and entered by said District court and binding upon the said petitioner.

It is therefore ordered and adjudged by the court, that the motion of the said petitioner to be discharged from his arrest, confinement and imprisonment under the order of the District court aforesaid, be and the same is hereby overruled and denied, and that his petition aforesaid be and the same is hereby dismissed; that said Counselman be and he is hereby remanded to the custody of the said marshal, that the writ of *habeas corpus* issued herein on his behalf be discharged and that he pay the costs of these proceedings to be taxed.

And the said Charles Counselman, being now present in court, excepts to the order and judgment of the court aforesaid, and prays an appeal therefrom to the Supreme court of the United States, which is granted upon his filing a bond for costs in appropriate form, in the penal sum of two hundred and fifty dollars, with
32 Lucius B. Otis as surety, which is immediately filed and approved.

And thereupon, the said Charles Counselman also, in open court, further prays that he may be admitted to bail and discharged from his said arrest and imprisonment pending the said appeal, which prayer of said Counselman is granted, upon his entering into a recognizance in the penal sum of two thousand dollars, in appropriate form, with surety to be approved by the clerk of this court.

And it is further ordered that the clerk embrace in the transcript of the record for the Supreme court, the petition in this cause and the exhibits thereto, the writ of *habeas corpus* issued thereon, with the marshal's return thereto, the motion of the said Counselman for his discharge and the several orders of this court, together with the bond and recognizance as herein provided.

33 On the same day, to wit: On the 18th day of December,

1890, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

APPEAL BOND.

Know all men by these presents: That we, Charles Counselman as principal, and Lucius B. Otis, as surety, both of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto the United States of America in the penal sum of two hundred and fifty dollars ($250) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this eighteenth (18th) day of December, A. D. 1890.

Whereas, in a certain proceeding instituted in the Circuit court of the United States for the Northern district of Illinois, and in the Northern division thereof, upon the petition of said Charles Counselman to be released and discharged from arrest and confinement under an order and judgment of the District court of the United States for said district and division, set forth in said petition, upon which petition the said Circuit court awarded to the said Charles Counselman the writ of *habeas corpus*, directed to the marshal of said district and division, then holding the said Counselman in
34 custody, by virtue of said order and judgment of said District court; and

Whereas, the said marshal pursuant to the terms of said writ, has produced the body of said Charles Counselman before the court, and has filed in said cause his return to said writ, and the said Circuit court upon consideration of the matters set forth in said petition and the return of said marshal and the matters presented in connection therewith, has ordered and adjudged that the motion of said Counselman to be discharged from his said imprisonment be overruled and denied, that the writ of *habeas corpus* issued upon the petition of said Counselman aforesaid, be discharged, and the said petition be dismissed at the costs of the petitioner, and he, the said Counselman be remanded to the custody of said marshal, from which said order and judgment of said Circuit court, the said Charles Counselman prayed an appeal to the Supreme court of the United States, which was allowed.

Now, therefore, the condition of the above obligation is such, that if the said Charles Counselman shall well and truly prosecute his said appeal with effect, and shall, moreover, well and truly pay or cause to be paid all costs and damages properly chargeable

against him in case the said order and judgment of the said Circuit court shall be affirmed in and by the said Supreme court, then
35 and in that event this obligation to be void; otherwise to remain in full force and effect.

CHARLES COUNSELMAN, [SEAL.]
LUCIUS B OTIS. [SEAL.]

Approved,
W. Q. GRESHAM.
(Endorsed.) Filed Dec. 18, 1890.

WM. H. BRADLEY,
Clerk.

36 On the same day, to wit: On the eighteenth day of December, 1890, there was filed in said clerk's office a recognizance in said entitled cause, which said recognizance is in the words and figures following, to wit:

RECOGNIZANCE.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

Be it remembered, that on the eighteenth day of December, in the year of our Lord, eighteen hundred and ninety, Charles Counselman, as principal, and Lucius B. Otis, as surety, of the city of Chicago, in said division and district, came before William H. Bradley, clerk of the Circuit court of the United States for the Northern district of Illinois, and severally and respectively acknowledged themselves to owe and be indebted to the United States of America in the sum of two thousand dollars, to be made and levied of their respective goods and chattels, lands and tenements, if default be made on the following conditions:

Whereas, the said Charles Counselman, on the 25th day of November, A. D. 1890, at the adjourned October term of the United States District court for the Northern district of Illinois, was adjudged guilty of contempt and ordered by said District court that he be fined in the sum of five hundred dollars and held in custody by the United States Marshal of said district until he should pay the said fine and purge himself of the said contempt.

And, whereas, to wit: On the 25th day of November, A. D.,
37 1890, the said Charles Counselman filed his petition in the Circuit court of said district for a writ of *habeas corpus* to release him from the custody of the said marshal, which said writ was

issued by the said Circuit court on the 26th day of November, A. D. 1890; that afterwards, on the —— day of ———, A. D. 1890 the said Circuit court, having considered said petition and the return of the marshal thereon, setting forth the cause of the detention of the said Charles Counselman, did order and direct that said writ so issued be discharged, and that the said Charles Counselman be remanded to the custody of the said marshal; from which order said Charles Counselman then and there prayed an appeal to the Supreme court of the United States, and also then and there applied to be admitted upon recognizance until the determination of said appeal by said Supreme court, which said motion for appeal and order to be admitted to bail was then and there allowed, upon said Charles Counselman filing an appeal bond and entering into a recognizance with the United States in the sum of two thousand dollars, with sufficient sureties, conditioned as herein.

Now, therefore, the conditions of this recognizance is such that if the above bounden Charles Counselman shall personally be and appear at the next term of the said Circuit court, and at each subsequent term thereof, on the first days thereof, until the determination of said appeal, and shall not at any of the terms of said court
38 depart without leave, and that in case the judgment of the said Circuit court is affirmed, he will surrender himself to the said marshal and abide the order of the said Circuit and Supreme court, then this recognizance to be void; otherwise to remain in full force and virtue.

CHARLES COUNSELMAN. [SEAL.]
LUCIUS B. OTIS. [SEAL.]

Subscribed and acknowledged this eighteenth day of December A. D. 1890, before me in open court.

[SEAL.] WILLIAM H. BRADLEY,
Clerk.
by GEO. W. KEMP,
Deputy U. S. Courts, N. D. Ills.

Approved: WM. H. BRADLEY,
Clerk.

(Endorsed): Filed December 18, 1890.
WM. H. BRADLEY,
Clerk.

39 NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, William H. Bradley, Clerk of the Circuit court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the matter of the petition of Charles Counselman for a writ of *habeas corpus* as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said district, this second day of January, 1891.

[SEAL.] WM. H. BRADLEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

Of the October Term, A. D. 1891.

In the matter of Charles Counselman, *Appellant.* } *Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.*

And afterwards, to wit: at the October term, A. D. 1891, of the Supreme court of the United States, and before the justices thereof, comes the said appellant, Charles Counselman, by Jno. N. Jewett, his attorney, and states and makes known to the said court that in the record and proceedings aforesaid, and in the rendition of judgment therein, manifest error hath intervened, to the prejudice of the said appellant, in this, to wit:

First. It appears upon the face of said record and proceedings that the grand jury, upon whose reports the orders of the District court were predicated, and which alone constituted the basis for the order and judgment of the District court imposing a fine upon the said appellant, and committing him to the custody of the Marshal of the United States for the Northern District of Illinois, were made and entered, and under which he was held in custody by said marshal, was not in the exercise of its legitimate authority, in the prosecution of the investigation, in furtherance of which the said appellant was called before said grand jury to give evidence, and the said grand jury could not, for that reason, insist that the said

appellant should answer any question propounded to him relating to said investigation.

Second. For the reason that said grand jury had no jurisdiction or authority to prosecute the investigation set out and referred to in their several reports to the said District court; the said District court had no rightful authority to consider the said reports, or to make any order or orders based thereon, and the said several orders and judgment of the said District court, for that cause, should, by the said Circuit court, have been held to be absolutely void, and the said appellant discharged from his arrest and confinement, in pursuance of the prayer of his petition.

Third. The several orders and judgment of the said District court, set out in the said record and proceedings, and the final order and judgment of the said Circuit court, are in violation of the *Fourth* Amendment to the Constitution of the United States.

Fourth. The said several orders and judgment of the said District court set out in the record and proceedings aforesaid, and the final order and judgment of the said Circuit court, are in violation of the *Fifth* Amendment to the Constitution of the United States.

Fifth. The said final order and judgment of the said Circuit court is in violation of the laws of the United States, and especially of Section 860 of the Revised Statutes of the United States.

Sixth. The said final order and judgment of the said Circuit court should have been in favor of the said appellant and in accordance with the prayer of his said petition, upon which the writ of *habeas corpus* was awarded to him, and the said Circuit court erred in overruling the motion of the said appellant to be discharged from his arrest and confinement, and in dismissing his petition and remanding him to the custody of the marshal.

For which said errors and others appearing on the face of said record and proceedings, the said appellant prays, that the said final order and judgment of the said Circuit court may be reversed, annulled and for naught esteemed and that he may be restored to all which he has lost by reason thereof.

JNO. N. JEWETT,
Atty. for Appellant.

FILED.
NOV 21 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

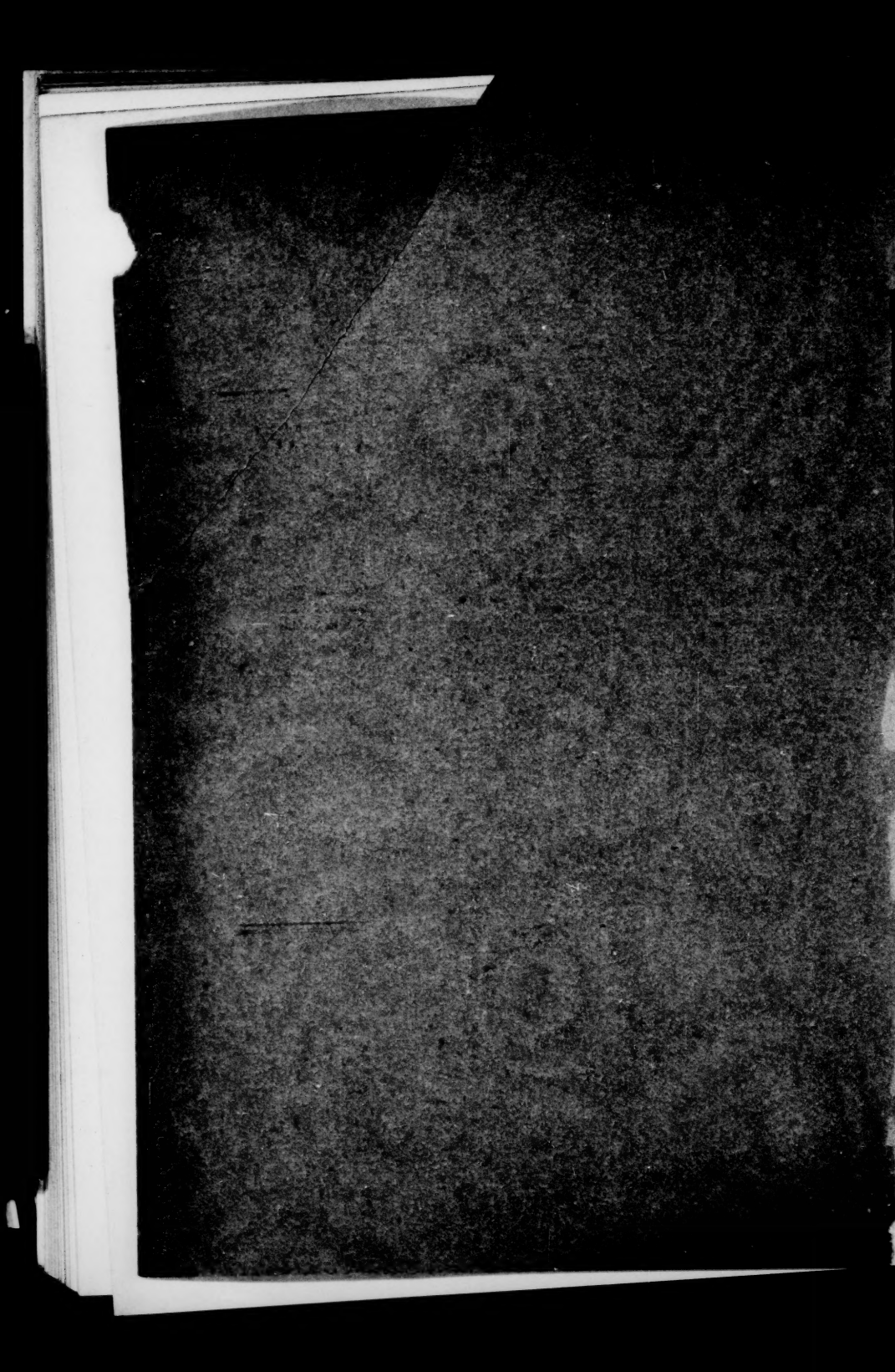
CHARLES COUNSELMAN,
Appellant,
vs.
FRANK HITCHCOCK, MARSHAL OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT,

BY

JOHN N. JEWETT.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

CHARLES COUNSELMAN,
Appellant,

vs.

FRANK HITCHCOCK, MARSHAL OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF FACTS.

In 1887 Congress passed an act entitled: "An Act "to Regulate Commerce," which received the approval of the President on February 4th of that year. The act was subsequently amended and the amendment became effective (if effective at all) by the approval of the President on the 2d day of March, 1889. The pending case is an outgrowth of attempted proceedings under the original and amended act, *of a criminal character*, before a grand jury of the District court of the United States for the Northern district of Illinois. No technical exceptions are taken to the empaneling of the grand jury. The case admits that it was lawfully convened. It was

in session on the 21st day of November, 1890, and in obedience to its request, served upon him, Mr. Counselman appeared before the jury, on that day, presumably to be interrogated as a witness. After the usual preliminary questions, establishing simply Mr. Counselman's identity, residence and business, certain questions were put to him, which he refused to answer on the ground, *distinctly alleged by him*, that "*the answers to those ques-*" *tions would tend to criminate himself.*"

The refusal of Mr. Counselman to answer the questions was, by the grand jury, reported to the District court, on the 22d day of November, 1890, and upon that report, which was not controverted as to its facts, the District court overruled the objections made by Mr. Counselman to answering the questions, and, on the 25th day of November, 1890, ordered him to again appear before the grand jury and answer the questions, which had been propounded to him, and such further questions touching the same subject-matter as might be put to him by the grand jury, the disttict attorney or his assistants.

Mr. Counselman went before the grand jury, in obedience to this order of the District court and, again and for the same specific reason, refused to answer the questions originally propounded to him, and also, refused (assigning the same reason) to answer other questions of a similar character. This second refusal of Mr. Counselman to answer questions, was on the same day (November 25th) reported to the District court by the grand jury (the report setting out in full, amongst other things, the questions asked and the reason of the refusal to answer), and Mr. Counselman, being then in court and persisting in his refusal to answer, was held to be *in contempt* of the authority of the court, was adjudged to pay a fine of $500 and

the costs of the proceedings against him, and was committed to the custody of the United States marshal for the district, there to be held "until he shall have *answered* "*said questions and all questions of similar import which* "*shall be propounded to him by the grand jury, or the* "*district attorney or any assistant district attorney in the* "*presence of such jury, and such fine and costs are paid.*"

Under this order and judgment of the Distrcit court, Mr. Counselman was taken into custody by the marshal and soon thereafter, and on the 26th day of November, 1890, presented to the judge of the Circuit court for said Northern district of Illinois, his petition for a writ of *habeas corpus*, asking to be discharged from the custody and confinement, in which he was held under and by virtue of said order and judgment of the District court. The petition sets out in full the reports of the grand jury to the District court and the orders of that court made thereon, the substance of which is above recited, and avers, that the petitioner was held in custody and confinement under the orders of the District court aforesaid, *and for no other cause; that the Grand jury were not in the exercise of any rigthful authority*, in the investigations undertaken by them, and in respect to which the petitioner was called before them and interrogated, and that the orders of the District court were in violation of the rights of the petitioner under the fourth and fifth amendments to the constitution of the United States and of the laws thereof.

The writ of *habeas corpus* was granted upon the petition, and was duly issued, directed to the marshal. On the 26th day of November, 1890, the marshal made return to the writ, that he held Mr. Counselman in custody solely by virtue of the order and judgment of the Dis-

trict court above referred to, and a copy of the final order and judgment are made a part of the return. The cause was submitted to the Circuit court upon the petition of Mr. Counselman, the return of the marshal to the writ of *habeas corpus* (the facts alleged being admitted to be true), and the motion of Mr. Counselman to be discharged. The court overruled the motion of Mr. Counselman, dismissed his petition, with costs, and remanded him to the custody of the marshal. It is from this judgment of the Circuit court that the present appeal is prosecuted.

Mr. Counselman, in his preliminary examination, stated, that he was a commission merchant, doing business in Chicago, and a dealer in grain, and that he had purchased grain during the year preceding his examination, in Kansas and Nebraska, which had been transported to Chicago over the Chicago, Burlington and Quincy, and the Chicago and Rock Island Railroads. (Rec., 3.) With the other railroads named in the reports of the grand jury, it does not appear that he had any business relations.

In order to complete the statement of *facts*, upon which briefs and arguments *should* be predicated, further reference must be made to the reports of the grand jury to the District court. As to preliminary and jurisdictional facts, the two reports are substantially the same. (Rec., 3 and 6.) I take the first report (Rec., 3) as fairly illustrative of both. This report says: "The grand "jurors in attendance upon said court respectfully report "and present to the court, that on the 21st day of "November, A. D. 1890, they, the grand jury, were en- "gaged in investigating and enquiring into certain "alleged violations in the district and division aforesaid,

"of an act of Congress, entitled: 'An Act to Regulate "'Commerce,' approved and in force February "4, 1887, and the amendments thereto, approved "and in force March 2, 1889, *by the officers "and agents of the Chicago, Rock Island and "Pacific Railway Company, and by the officers and agents "of the Chicago, St. Paul and Kansas City Railway "Company, and by the officers and agents of the Chicago, "Burlington and Quincy Railroad Company, and the "officers and agents of* VARIOUS OTHER *railroad companies, "having lines of road in said district and division.*"

The questions deemed objectionable, and which Mr. Counselman declined to answer, may, in their character, be illustrated by a few examples, as follows (Rec., 4):

"Q. Have you, during the past year, Mr. Counsel- "man, obtained a rate for the transportation of your "grain on any of the railroads coming to Chicago from "points outside of this state, less than the tariff or open "rates?" (Rec., 4.)

"A. That I decline to answer, Mr. Milchrist, on the "ground that it might tend to criminate me.

* * * * *

"Q. Have you, or the firm of Charles Counselman & "Co., secured any rebate, drawback or commission from "the Chicago, Rock Island and Pacific Railroad Com- "pany, or the Chicago, Burlington and Quincy Railroad "Company, on the transportation of grain from points in "the States of Nebraska and Kansas to the city of Chi- "cago, in the State of Illinois, during the past year, "whereby you secured the transportation of grain at less "than the tariff rates established by said railroads." (Rec., 4.)

"A. I decline to answer, on the same ground."

These questions and others of the same tendency, were repeated to Mr. Counselman on his second appearance before the grand jury (Rec., 6 and 7), all of which he declined to answer, for the specific reasons, *that his answers would tend to criminate himself*.

The section of the interstate commerce law here involved would seem to be amended section 10, which is as follows, the amendment of 1889 being in italics:

"SEC. 10. (Amended.) That any common carrier "subject to the provisions of this act, or, whenever such "common carrier is a corporation, any director or officer "thereof, or any receiver, trustee, lessee, agent or per- "son acting for or employed by such corporation, who, "alone or with any other corporation, company, person "or party, shall wilfully do or cause to be done, or "shall willingly suffer or permit to be done, any act, mat- "ter or thing in this act prohibited or declared to be un- "lawful, or who shall aid or abet therein, or shall wilfully "omit or fail to do any act, matter or thing in this act "required to be done, or shall cause or willingly suffer or "permit any act, matter or thing so directed or required "by this act to be done not to be so done; or shall aid or "abet any such omission or failure, or shall be guilty of "any infraction of this act, or shall aid or abet therein, "shall be deemed guilty of a misdemeanor, and shall "upon conviction thereof in any District court of the "United States within the jurisdiction of which such of- "fense was committed, be subject to a fine of not to ex- "ceed five thousand dollars for each offense. *Provided*, "*That if the offense for which any person shall be con-* "*victed as aforesaid shall be an unlawful discrimination in* "*rates, fares, or charges for the transportation of passen-* "*gers or property, such person shall, in addition to the fine*

"hereinbefore provided for, be liable to imprisonment in "the penitentiary for a term of not exceeding two years "or both such fine and imprisonment, in the discretion of "the court."

"Any common carrier subject to the provisions of this "act, or whenever such common carrier is a corporation, "any officer or agent thereof, or any person acting for or "employed by such corporation, who, by means of false "billing, false classification, false weighing, or false report "of weights, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or "permit any person or persons to obtain transportation for "property at less than the regular rates then established "and in force on the line of transportation of such common "carrier, shall be deemed guilty of a misdemeanor, and "shall upon conviction thereof in any court of the United "States of competent jurisdiction within the district in "which such offense was committed, be subject to a fine of "not exceeding five thousand dollars, or imprisonment in "the penitentiary for a term of not exceeding two years, "or both, in the discretion of the court, for each offense."

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of "this act, or for whom, as consignor or consignee, any such "carrier shall transport property, who shall knowingly and "wilfully, by false billing, false classification, false weighing, false representations of the contents of the package, "or false report of weight, or by any other device or means, "whether with or without the consent or connivance of the "carrier, its agent or agents, obtain transportation for "such property at less than the regular rates then established and in force on the line of transportation, shall be "deemed guilty of fraud, which is hereby declared to be a

"misdemeanor, and shall, upon conviction thereof in any "court of the United States of competent jurisdiction with- "in the district to which such offense was committed, be sub- "ject, for each offense, to a fine of not exceeding five thou- "sand dollars or imprisonment in the penitentiary for a "term of not exceeding two years, or both, in the discretion "of the court.

"If any such person, or any officer, or agent of any such "corporation or company, shall, by payment of money or "other thing of value, SOLICITATION, OR OTHERWISE, in- "duce any common carrier subject to the provisions of this "act, or any of its officers or agents, to discriminate un- "justly in his, its or their favor as against any other "consignor or consignee in the transportation of property "OR SHALL AID OR ABET any common carrier in any such "unjust discrimination, such person or such officer or agent "of said corporation or company SHALL BE DEEMED GUILTY "OF A MISDEMEANOR, and shall, upon conviction thereof in "any court of the United States of competent jurisdiction "within the district in which said offense was comitted, be "subject to a fine of not exceeding five thousand dollars, or "imprisonment in the penitentiary for a term of not exceed- "ing two years, or both, in the discretion of the court, for "each offense; AND SUCH PERSON, CORPORATION OR COM- "PANY shall, also, together with said common carrier, be "liable, jointly or severally, in an action on the case to be "brought by any consignor or consignee discriminated "against in any court of the United States of competent "jurisdiction, for all damages caused by or resulting there- "from."

The foregoing is believed to be a full and fair statement of the facts upon which the judgment of the Circuit court, appealed from, was predicated and to which conclusions of law must be applied. The facts are admitted.

ERRORS ASSIGNED UPON THE RECORD.

First. It appears upon the face of said record and proceedings, that the grand jury, upon whose reports the orders of the District court were predicated, and which alone constituted the basis for the order and judgment of the District court, imposing a fine upon the said appellant, and committing him to the custody of the marshal of the United States for the Northern district of Illinois, were made and entered, and under which he was held in custody by said marshal, was not in the exercise of its legitimate authority, in the prosecution of the investigation, in furtherance of which the said appellant was called before said grand jury to give evidence, and the said grand jury could not, for that reason, insist that the said appellant should answer any question propounded to him relating to said investigation.

Second. For the reason that the said grand jury had no jurisdiction or authority to prosecute the investigation set out and referred to in their several reports to the said District court, the said District court had no rightful authority to consider the said reports, or to make any order or orders based thereon, and the said several orders and judgment of the said District court, for that cause, should, by the said Circuit court, have been held to be absolutely void, and the said appellant discharged from his arrest and confinement, in pursuance of the prayer of his petition.

Third. The several orders and judgment of the said District court, set out in the said record and proceedings, and the final order and judgment of the said Circuit court, are in violation of the fourth amendment of the Constitution of the United States.

Fourth. That said several orders and judgment aforesaid of the said District court set out in the record and proceedings aforesaid; and the final order and judgment of the said Circuit court, are in violation of the fifth amendment to the constitution of the United States.

Fifth. The said final order and judgment of the said Circuit court is in violation of the laws of the United States, and especially of Section 860 of the Revised Statutes of the United States."

The foregoing assignment of errors is deemed to be sufficient to cover all the questions, which can be legitimately raised upon the facts of the record, however they may be divided for purposes of illustration and discussion.

BRIEF OF ARGUMENT.

I.

The grand jury of the District court was not in the exercise of its proper and legitimate authority in prosecuting the investigations *specifically* set out in their several reports to said District court. *Therefore*, these reports could not be made the foundation of any judicial action by the court.

Appeal of Hartrarift *et al.*, 85 P. St., 433 to 443.

Justice Field's Charge to Jury, 2 Sawyer, 667–672, N. 675.

In Re Pacific Ry. Co., 32 Fed. Rpt., 241, 255.

U. S. v. *Hill*, 1 Brock (C. C.), 156.

The People v. *Hackley*, 24 N. Y., 74–79.

II.

The Interstate Commerce Commission was by the Interstate Act (assuming it to be valid), specially invested with the authority to investigate, and were charged with the duty of investigating infringements or violations of that act, and no obligation or duty, in that respect is imposed upon the grand jury, until specific charges have been made.

See Sec. 12 of the Act.

III.

A general statement of the law, both ancient and modern, may be reduced to the following propositions, viz.: that a witness shall not be *compelled* to make disclosures, or give testimony, *which would tend to criminate himself, or subject him to fines, penalties or forfeitures.* The ancient rule, if not the modern, went further than this, and exempted the person, whether by way of discovery or testimony, from all obligation to give evidence of matters *which would tend to disgrace him or subject him to ecclesiastical censure.* The distinction between *discovery* and *testimony*, as here suggested, relates, of course, to the distinction between jurisdiction in equity and jurisdiction at law, the latter including both civil and criminal causes.

As to *discoveries* in chancery, the following citations are made in support of the general statement.

Honeywood v. *Gelwin*, 3 Atkyns, 276.
Smith v. *Reed*, 1 Atkyns, 526.
Harrison v. *Southcote*, 1 Atkyns, 528.
Wigram on Discovery, * p. 61.
Franco v. *Bolton*, 3 Vesey, Jr., 368.
Paxton v. *Douglas*, 16 Vesey, Jr., 239.
Mitford's Pleadings, * p. 194.
Cooper's Eq. Pleadings, 202.
Story's Eq. Pldgs., Secs. 524, 575-6-7, 592.

As to the application of the same general statement to proceedings at law, reference is made to

Rex v. *Stancy* (24 E. C. Law, 532) 5 C. & P., 213.
Cates v. *Hardacre*, 3 Taunton 424.

Rex v. *Servis et al.*, 4 Espinasse, 225.
Mahoney v. *Bartley*, 3 Campbell, 210.
1 Starkie on Evidence, *p. 71 and 191.
The Case of Sir John Friend, 13 Howell's St. Trials, 1.
The Case of Earl of Macclesfield, 16 Howell's St. Trials, 767.
1 Greenleaf on Evidence, Sec. 451 and Note.
Wharton's Crim. Evidence (9th Ed.), Sec. 463 and references.
Southard v. *Rexford*, 6 Cowan, 254.
The People v. *Mather*, 4 Wend., 229.
Lister v. *Baker*, 6 Blackf. (Ind.), 439.
Phelin v. *Kenderdine*, 20 Pa. St., 354.
State v. *Bailey*, 54 Iowa, 414.
State v. *Edwards*, 2 N. & McC., 13.

IV.

The proceedings in which Mr. Counselman was called upon to testify, was a *criminal case* (if it was any case) within the meaning of the fifth amendment to the constitution of the United States, which says, that "No person "* * * shall be compelled, *in any criminal case* to be "a witness against himself"—and his admitted relations to the subject of inquiry before the grand jury, were such as entitled him to invoke, as he did, the protection of that article of the constitution.

Benson v. *Cromwell*, 26 Barb., 218.
Cook v. *State*, 7 Blackf., 165.
State v. *Newell*, 58 N. H., 413.
Emery's case, 107 Mass., 172.

V.

These points being established, it must be conceded as a logical result, that the fifth amendment to the constitution of the United States fully and broadly justified Mr. Counselman in refusing to answer the questions propounded to him by, or before the grand jury and was designed *to protect him* in that refusal. The only answer that can be made to this proposition is certain legislation, *especially* Sec. 860 of the revised statutes of the United States.

This legislation is ineffectual to take away the constitutional immunity, for the following reasons:

1st. *Mere legislation can not take away, amend or modify a constitutional privilege or immunity.*

2d. *The legislation referred to merely limits the use of discovery or testimony voluntarily given.* It does not even *pretend to compel* the making of discovery or the giving of evidence, tending to criminate the witness, or which, in its remotest consequences, can subject him to penalties or forfeitures. The legislation, therefore, being limited in its operation to discoveries *voluntarily* made and testimony *voluntarily* given, leaves the constitutional question wholly unembarassed in respect to the right of *compulsion.*

3d. The protection afforded by the legislature is not the equivalent of the constitutional immunity and, *therefore* cannot be a substitute for it.

Cullen v. *Commonwealth*, 24 Grattan, 624.
Emery's Case, 107 Mass., 172.
State v. *Newell*, 58 N. H., 413.
Boyd v. *U. S.*, 116 U. S, 616.

4th. The legislation referred to has reference and application only to *civil* cases, and, under no circumstances, can be construed to embrace cases of a criminal nature.

ARGUMENT.

I.

THE GRAND JURORS OF THE DISTRICT COURT, IN THE PROSECUTION OF THE INVESTIGATION, AS REPORTED BY THEM, WERE NOT EXERCISING ANY APPROPRIATE OR LEGITIMATE FUNCTION, OR PERFORMING ANY DUTY LEGITIMATELY BELONGING TO THEM, AS A GRAND JURY.

This proposition is not, *necessarily*, a controlling one in this case. I wish, however, to call the attention of the court to the fact, that a grand jury, although its sessions are *presumed* to be private and under the seal of the motto *sub silentio*, is neither a *star chamber* nor a *Spanish inquisition*. It is simply a part of a public judicial system, *attached by implication under the constitution and laws of the United States, to a special jurisdiction. A grand jury is simply an adjunct of the District courts of the United States. It is neither an independent, inquisitorial court*, nor a *detective agency*. It is to consider, as the court itself would consider, such complaints as are, *in legitimate form*, brought before it. It is not a censor of public morals or of common practices. It, like the court, must deal with *individuals*, either as between themselves, or as between individuals and the public. Its jurisdiction does not reach out into unlimited fields of inquisitorial investigation, respecting the community in general, or a class of the community, to find out, in the first place, whether an offense has been committed by somebody in that community or class, and then individualize it, if they can. To

illustrate, (if my meaning is not apparent), no grand jury has a *legitimate* right to summon the community, as witnesses, for the purpose of discovering whether, in that community, an offense against an act of legislation has or has not been committed by somebody. The foundation of its jurisdiction must rest upon a *specific charge* and that charge must be *individualized* in the beginning. Some one (and that a person, natural or legal), must be charged with an offense, before the *authority, or the duty* of the grand jury to investigate an offense can attach.

The court cannot do more nor less, than take the statements of the grand jury itself for a verification of the character and quality of the *investigation*, in which it was engaged at the time, and in respect to which Mr. Counselman was called as a witness before it. That statement is embodied in each of the reports made to the District court, and upon which alone the orders and judgments of the District court, now objected to, were predicated. Each of these reports says that the grand jury were in session on the respective days named in their reports (Rec., 3 and 6), and were "engaged in investigating and "inquiring into certain alleged violations of an act of Con- "gress entitled, 'An Act to regulate commerce,' ap- "proved and in force February 4th, A. D. 1887, and the "amendments thereto, approved and in force March 2d, "A. D. 1889, *by the officers and agents of the Chicago, "Rock Island and Pacific Railway Company and by the "officers and agents of the Chicago, St. Paul and Kansas "City Railway Company, and by the officers and agents "of the Chicago, Burlington and Quincy Railroad Com- "pany, and the officers and agents of various other rail- "road companies having lines of road in said district and "division.*"

This statement defines, for all the purposes of this case, the exact character of the investigation which the grand jury had taken upon itself to make. No individual or individuals are named as a violator, or violators of the law referred to. The substance of the statement is, that the grand jury have entered upon an *inquisitorial* investigation against a certain class of citizens, viz: the officers and agents of all railway companies having lines of railroad within the jurisdiction of the court, for the purpose of finding out, 1st, whether any violation of the law had been committed; and then, 2d, to find out who, if any one, had been guilty of the offense. Can any *star chamber* or *inquisitorial court*, ever devised for extorting testimony under fines and penalties, exceed this in universality? In the days when such institutions were in force, under either civil or ecclesiastical rule, the *rack and other instruments of torture* were the means resorted to, to compel criminating confessions. Is it the *civilized* idea of the present age and *under our constitution*, that the same confessions may be extorted through fines, penalties and forfeitures?

It would be a singular spectacle, presented by a grand jury, if, upon a rumor, that goods had been purloined from one or more of the large mercantile houses of the country, the grand jury should set itself at work to verify the rumor, and should, for that purpose, attempt to bring before it the merchants and their employes in aid of their *detective* work, NO PERSONAL CHARGE BEING MADE. No merchant of the country, no *man* of the nation, would entertain, or suffer such a theory of the uses and purposes of a grand jury.

So wide a departure from the general service of a grand jury, as is illustrated in this case, has seldom oc-

curred. Such loose and unlimited range of investigation has but few parallels, if any, in reported cases, and then, approximately only, *under conditions of great popular excitement*, and *in the midst of public disaster*. Even under such conditions, the courts have not sanctioned or favored such proceedings.

The riots at Pittsburgh in July, 1877, which resulted in the destruction of much valuable property and a great loss of life, will readily be recalled. In October of that year, the grand jury of Allegheny county undertook, with the apparent sanction of the court of quarter sessions, an investigation of the riots *in a general way* and subpœnas for witnesses were issued to various persons, and amongst others to Gov. Hartranft and other state officials, to be present and testify as witnesses and to produce books and papers upon this general inquiry. The officials refused to obey the subpœnas and an attachment against them was ordered by the court, and, out of this state of facts, arose the case entitled, *Appeal of Hartranft et al.* v. *Commonwealth*, 85 Pa. St., 433.

The case involved the question of the right of one department of the government to compel an exposure of the proceedings of another department. That question does not arise here. It also involved the regularity and legality of the proceedings of the grand jury. The attachment was set aside by the judgment of five out of seven of the justices of the Supreme court of Pennsylvania. *The dissenting opinion* of Ch. J. Agnew is not a temperate exposition of the law. It ranges itself with the opinion of the Supreme court of Illinois in the case of *Munn & Scott* v. *The People*, &c., 69 Ill., 80.

The majority of the court, notwithstanding the aggravations of the situation, seem to have considered the

case with great firmness and deliberation, and upon the question here pertinent, which is the opening one of the opinion, at page 443, say:

"No doubt the court might have directed a subpœna "to have issued *for the commonwealth, in any case where* "*the commonwealth was a party* or where it was apparent "it was in some way interested *in some case or transac-* "*tion* then depending. So might it have directed a war- "rant to have issued for the arrest of some one guilty of "a crime or misdemeanor, but in such a case, no one "would contend that the blank warrant of the court "would in itself be sufficient to retain a citizen for one "moment. The authority for such warrant must appear "upon its face *or it is worthless.* But the court's sub- "pœna is no more respectable than its warrant. If the "subpœna exhibit no authority, it may be disobeyed with "impunity. Now, in the case before us, the common- "wealth was not a party in interest, *or, if so, it is not now* "*apparent.* It seems *from the petition of the grand jury,* "that the citizens of the county of Allegheny are "greatly concerned in having a careful investigation "of the late riots, but *whether they are concerned in* "*bringing the rioters to justice or not* is not stated, *though* "*this was the only matter in which the commonwealth* "*could be concerned.*" (It does not appear in the present case that anybody was interested in the investigation of the grand jury.) "Moreover, as the grand jury was act- "ing under no instructions, it was not possible, even for "the court, to know what that jury was doing or intend- "ing to do, *but of this the court should have been informed* "*before it undertook to interfere with the personal liberty* "*of the citizen by its summary process of attachment,* for "as the matter now stands, it is apparent that the sub-

"pœna is issued for no *tangible cause or party, and for* "*no defined legal purpose; hence, no one was bound* "*to obey it.*"

A grand jury, as a body, is not an *informer*, nor an *accuser*. This proposition ought to be accepted as an *axiom*. Breaches of the law are personal and not by the wholesale. They do not attach to a community as a class. A complaint before a grand jury must, therefore, be *individualized*, and the specific complaint must be the subject of its jurisdiction. What it may discover in the course of its investigation of a *specific* complaint, may lead, *legitimately*, to further personal investigations, as upon its own information, acquired in the course of legitimate duties. If no authority could be found, announcing this doctrine in specific terms, it ought not to be rejected for that reason only. It is strongly supported by the charge of Mr. Justice FIELD to the grand jury, reported in an appendix to 2 Sawyer, at page 667. The special occasion for the charge does not appear; but it outlines at pages 672 and 673 the boundaries of jurisdiction with commendable accuracy.

There is appended to the report of this charge a footnote, more directly applicable here, perhaps, than the body of the charge, credited to 5th Penn. Law Journ., 63, 64. This note seems to be immediately appropriate. It says: "In a case which arose in Philadelphia in 1845, "Judge King considered at length, in an elaborate and "very able opinion, the duties of grand juries in criminal "cases, and his views agree substantially with those ex- "pressed in the charge. 'Our system of criminal ad- "ministration,' says the judge, 'is not subject to the "reproach that there exists in it *an irresponsible body* "*with unlimited jurisdiction.* On the contrary, the duties

"of a grand jury in direct criminal accusations are con-
"fined to the investigation of matters given them in
"charge by the court, * * * and they cannot, on
"the application of any one, originate proceedings
"against citizens, which is a duty imposed by law *on*
"*other public agents.* This limitation of authority we re-
"gard as alike fortunate for the citizen and the grand
"jury. It protects the citizen from the prosecution and
"annoyance which private malice or personal animosity,
"introduced into the grand jury room, might subject him
"to. And it concerns the dignity of the grand jury and
"the veneration with which they ought always to be re-
"garded by the people, by making them umpire *between*
"*the accuser and the accused, instead of assuming the*
"*office of the former.*' "

The position taken is, that the grand jury, at the time Mr. Counselman was before it and was interrogated, was not engaged in the investigation *of any case*, in which a subpœna could issue, or, in other words, that there was *no case* before the grand jury. Therefore, it had no authority or jurisdiction to compel the attendance of Mr. Counselman as a witness, or, being present, to compel him to give evidence of any sort. The result must be, that the reports made by the grand jury, upon which alone, the orders of the District court were predicted, were extra-jurisdictional, amounting to nothing more than a general rumor, started and set afloat by any other body of citizens, of which *the court* could take no judicial notice and upon which it could make no order. These reports, as set out in the record, must determine absolutely the legal status of the proceedings. They are plain and must be accepted as truthful statements; but, *upon the very face of them*, they represented a condition

of things, which was without the jurisdiction of the court and therefore without the jurisdiction of the grand jury.

In the case of *The United States* v. *Hill et al.*, 1 Brock., (C. C.) Repts., 156, Ch. J. MARSHALL, at page 159, uses this language respecting the powers and jurisdiction of a Federal grand jury:

"It has been justly observed that no act of Congress "directs grand juries or defines thair powers. By what "authority then are they summoned and whence do they "derive their powers?

"The answer is, that the laws of the United States "have erected courts which are invested with criminal "jurisdiction. This jurisdiction they are bound to exer- "cise and it can only be exercised through the instru- "mentality of grand juries. *They are therefore given by "a necessary and indispensable implication.* But how far "is this implication necessary and indispensable? The "answer is obvious. Its necessity is co-extensive with "that jurisdiction to which it is essential. Grand juries "are *assessories* to the criminal jurisdiction of a court and "they have power to act and are bound to act *so far as "they can aid that jurisdiction.* Thus far the power is "implied, and is as legitimate as if expressly given. To "suppose the powers of a grand jury, not by express "statute, but by the necessity of their aiding the jurisdic- "tion of a court, to transcend that jurisdiction, would be "to consider grand juries once convened to be clothed "with powers not conferred by law, but originating with "themselves. *This has never been imagined.*"

Every judge and especially every judge of a Criminal court is a peace officer and competent to exercise the functions of a committing magistrate. This is a part of his official authority and jurisdiction. As respects the

courts of the United States, grand juries and court commissioners are ancillary to this jurisdiction. *Their jurisdiction is not an independent one*, but simply a part of the general jurisdiction of the court to which they are, for the time being, attached, and, as such attachments, are designed to be in aid only of that jurisdiction. This is the plain teaching of the opinion of Ch. J. Marshall, from which the above quotations have been made.

In the case of the *People ex rel. Hackley* v. *Kelley*, 24 N. Y., 74 (a case in other features of it heretofore urged against the claims of the appellant) it is said at page 79: "But by the theory of proceedings in "criminal cases, the indictment is supposed to be pre- "pared and taken before the grand jury *by the counsel* "*prosecuting for the state; and the evidence is there given* "*in respect to the offense charged in it. If the party* "*accused* appears to be guilty, the indictment is certi- "fied to be a true bill; otherwise it is thrown out. *In* "*that* view of the practice, all which takes place be- "fore the grand jury, as well as the subsequent steps, may "be said to be proceedings *upon the indictment.*"

Whatever may be hereafter said as to the other parts of the opinion of Justice Denio in the case referred to, the quotation above made, fairly and reasonably sustains the position here taken, viz: *that charges of a criminal character in order to lay a foundation for investigation by a grand jury, must be individualized*, otherwise grand juries sink into inquisitorial courts, not unlike those presided over by Torquemada and Ximines in the middle centuries and *requests* issued by them, however framed and upon whatever matter, must stand as supreme law. This is not the American idea of the province of a grand jury.

I do not care to discuss the constitutionality of the

Inter-State Commerce Act. The question is not necessary in this case, if I understand it. Other counsel, in more direct proceedings, may be charged with the obligation of presenting that question to this court. In this connection, it seems to me to be sufficient to call the attention of the court to section 12 of the act, which confers, or attempts to confer on the Inter-State Commerce Commission, *special authority* to investigate violation of the act. The confering of the authority and an acceptance of the office, import an obligation to execute the authority. Its *detective* work, in this respect, lies in the line of the "Pinkerton Agency." It cannot transfer it, nor does the act transfer it, to a grand jury, where specific and *individualized charges are of the essence of jurisdiction.* The question is not a small one. It does not arise, nor is it pressed, as a technical one. If the position taken is right it determines the present case in favor of a reversal of the judgment of the Circuit court. If it should be decided adversely, then other questions arise, *of much more serious importance*, absolute and controlling, *because* they relate to the just and proper interpretation of constitutional provisions, applicable to all cases, whenever and however they may come before the courts.

It is neither desired nor expected, that the court, even though it should hold, that the objections to the jurisdiction of the grand jury are well taken (which would probably afford only technical and temporary relief to the appellant), should omit, for that reason, to consider the more important constitutional questions, which lie at the foundation, not only of this proceeding, but of all proceedings of a similar character, which, if not now adjudicated upon, may hereafter come before the court. It is insisted that the ruling and

judgment of the Circuit court here appealed from, and the rulings and judgment of the District court upon which they were predicated, were erroneous, because they were in violation of the fourth and fifth amendments to the Constitution of the United States and to the laws thereof. The objections referred to are stated in the third, fourth and fifth of the errors specially assigned upon the record, and in points 3, 4 and 5 of the brief of the argument, which, for present purposes, may be considered together.

II.

THE RULE IN CHANCERY IN RESPECT TO DISCOVERIES OR EVIDENCE CRIMINATING, OR TENDING TO CRIMINATE THE PARTY, FROM WHOM DISCOVERY OR EVIDENCE IS SOUGHT, OR TO SUBJECT HIM TO PENALTIES OR FORFEITURES, IS, THAT SUCH DISCOVERY OR EVIDENCE CANNOT BE COMPELLED.

In *Honeywood* v. *Selwin*, 3 Atkyns, 276, decided in 1744, Lord Chancellor HARDWICKE held upon exceptions to a master's report, that the defendant *was not obliged to discover in his answer* that, which would make him liable to certain *incapacities* prescribed by statutes of the 12 and 13 of William III, and that he had "done right "in insisting upon this matter in his answer."

In *Smith* v. *Reed*, 1 Atkyns, 526, decided in 1736, a plea was interposed in bar of discovery on the ground, that the discovery would or might lead to a forfeiture or penalty against the defendant. The same Lord Chancellor said (page 527): "I think the defendant is not "bound to discover, for there is a rule now established "in equity that a person shall not be obliged to discover

"what will subject him to a penalty, or anything in the "nature of a penalty."

The same doctrine is stated in the case of *Harrison* v. *Southcote*, 3 Atkyns, 528, decided in 1744.

In Wigram on Discovery, page 61, the author says: "If a question involves a criminal charge, *the plaintiff is* "*not entitled* to an answer to such question, however ma- "terial it may be to the *plaintiff's case*." Reference in that connection is made to *Thorpe* v. *Macauley*, 5 Madd, 229, and many other cases of ancient date.

In *Franco* v. *Bolton*, 3 Ves. Jr., 368, decided in 1797, the bill had been filed for the cancellation of a bond, alleged to have been given to defendant by the complainant in consideration of future illicit cohabitation between them. Apart from the quality of the alleged transaction considered by itself, various charges antedating the bond, were made aganist the defendant, and discovery was asked for. The bill was demurred to and the demurrer sustained, the Lord Chancellor, in concluding his opinion saying: "I cannot compel her to discover, whether be- "fore the connection, she capitulated with him for this "provision. That would make her liable, not only to "the *reproach*, but to the consequence of having lived "in this illicit course of life."

In the case of *Paxton* v. *Douglas*, 16 Ves. Jr., 239, the same question came up before Lord Chancellor ELDON upon a master's certificate, settling interrogatories addressed to one Charles Chester, who was a party in interest. Interrogatories had been submitted and allowed, the answers to which might have a criminating effect against the witness. The distinction was taken, and *well taken*, that the privilege was a personal one and could not be

settled upon the interrogaries alone; but the Lord Chancellor said, (page 242): "Upon the other point there is no "doubt. If a series of questions are put, all meant to es- "tablish the same criminality, you cannot pick out a "particular question and say if that alone had been put, it "might have been answered. *If it is one step having a "tendency to criminate him, he is not to be compelled to "answer.*"

In Mitford's Pleadings, 194, the author says: "*It is a "general rule*, that no one is bound to answer so as to "subject himself to punishment *in whatever manner that "punishment may arise*, and whatever may be the nature "of that punishment. If, therefore, a bill requires an "answer, which may subject the defendant to any pains "or penalties, he may demur to so much of the bill. "* * * And in such cases, if the defendant is not "obliged to answer the facts, he need not answer the cir- "cumstances, though they have not such an immediate "tendency to criminate."

In Cooper on Eq. Pleadings, published in 1809, the author at page 202, under the general head of *Discovery*, states the following as proposition XII. "That defend- "ant cannot be called upon to criminate himself or to ex- "pose himself to any forfeiture." And under this he "says: "*This is a maxim of the law founded upon the "principles of British freedom, and may be considered as "one of our constitutional rights and privileges.*

"This doctrine has been encroached upon in arbitrary "reigns, and particularly while the court of Star Chamber "was in existence of which the process and pleading was "the same as in chancery, but extended even to criminal "informations, to which the party accused was obliged to "answer under oath. This drew it into the greatest

"odium and was the principal cause of its downfall. The "Court of Chancery, however, has never compelled a "party to criminate himself and the fate of the Star "Chamber has, perhaps, made it still more strict in the "observance of the rule of pleading, so that its refusal to "take cognizance of anything relating to criminal juris- "prudence may be considered as the most prominent "feature, which distinguishes it from the court of com- "mon law, and it is so fundamental a rule, that equity, "which interferes in almost every other case to prevent "the application of the general law from working in- "justice, will not interfere against this rule."

See cased cited.

This same doctrine is announced and substantially supported in Story's Equity Pleadings, Secs. 524, 575, 576, 577, and 592 *et seq.* In Sec. 575 the learned author says: "The rule is that the defendant shall not be obliged to "discover what *may* subject him to a penalty or forfeiture "or criminal accusation and not what *must* only." And in Sec. 576 he further says: "This doctrine seems "founded on the great principles of constitutional right, "settled in early times in England, and *brought by our an- "cestors to America, by which it is established, that no man "is bound to accuse himself of any crime, or to furnish "any evidence to convict himself of a crime.* The maxim of "the common law is, *Nemo tenetur se ipsum prodere.* It "constituted one of the just objections to the court of the "Star chamber, that in criminal informations it compelled "the party accused to answer upon oath to the accusa- "tions; and this, in arbitrary times, *became an instrument "of gross oppression and injustice.*"

In Section 577 the same author says: "The doctrine

" is not confined to cases where the question or answer " has a direct tendency to criminate the defendant, or to " expose him to a penalty or forfeiture; but it goes fur- " ther *and protects him from answering any question* " *which may form a link in the chain* by which such a case " is to be established."

Further quotations from this section and also sections 592–5 would be pertinent in this connection as well as the authorities referred to in the text of the author, and to these the attention of the court is called. I omit them simply because there should be an *end* of quotations in an argument.

I have no *suspicion of a purpose to reinstate the Star Chamber court, either by means of a grand jury* or otherwise, in this country. The *prevention* of it, however, rests upon a broad and *liberal* construction of constitutional guarantees in favor of *personal rights*. A *Star Chamber* is but one degree removed from a *Spanish Inquisition*, with a Torquemada or Ximeses at its head. I use the words of Justice Bradley in the Boyd case, hereafter referred to, when I say: "It is "abhorrent to the instincts of an Englishman; it is " abhorrent to the instincts of an American. It may " suit the purpose of despotic power; but it cannot abide " the pure atmosphere of political liberty and personal " freedom."

The references, which have been made, would seem to establish the proposition, that by the ancient law of England, constituting a part of what is called its *constitution*, in favor of the rights and liberties of its subjects, it was established beyond judicial question, that in chancery proceedings, *no man should be compelled to make discovery or to answer interrogatories, when the discovery or answers*

would criminate or tend to criminate himself, or to subject him to penalties or forfeitures. The enforcement of a contrary doctrine in the Star Chamber court, led to its abolishment. This assertion is further supported by a reference to Cox's Institutions of the English Government, at page 404.

The citations thus far made have special reference to chancery proceedings. It would be difficult to conceive of a constitutional provision and the preservation of it in its integrity, capable of two or more different interpretations, according as the *special* case, which might call for its application, belonged to one or the other of two well recognized jurisdictions, viz: Jurisdictions in *equity* and jurisdictions at *law. Constitutional provisions cover all branches of judicial power.* The court will not fail to observe that some of the cases above referred to, and quotations from which have been made, distinctly announce the doctrine, that the ancient *British Constitution*, however it may have been occasionally encroached upon by *despotic power, exempted* the subject from any obligation to disclose, in chancery proceedings, any fact or facts which would *incriminate or tend to incriminate* himself, or subject him to a penalty or forfeiture. It may be safely said, that in England, the rule as to criminating disclosures, adopted as a constitutional provision in equity proceedings, is well and consistently supported in common law and criminal cases, and, therefore, I venture to assert,

III.

THE RULES OF THE COMMON LAW, ACCEPTED AND RELIED UPON AS FOUNDED UPON THE BRITISH CONSTITUTION AND IN PROTECTION OF THE RIGHTS AND LIBERTIES OF THE SUBJECT, EXEMPTING THE INDIVIDUAL SUBJECT FROM THE GIVING OF EVIDENCE CRIMINATING OR TENDING TO CRIMINATE HIMSELF AND TO THE FULL EXTENT SANCTIONED IN CHANCERY, PREVAILED AND ARE APPLICABLE IN ALL CASES AT LAW, EITHER CIVIL OR CRIMINAL.

A few references will be sufficient to illustrate this.

In *Rex* v. *Stancy*, 5 C. & P., 213, (24 E. C. L., 532), Lord Tenterdon, C. J., said: "You cannot only not "compel a witness to answer that which will criminate "him, but that *which tends to criminate him;* and the rea- "son is this, the party would go from one question to an- "other, and though no question might be asked, the an- "swer to which would directly criminate the witness, yet "*they would get enough from him whereon to found a* "*charge against him.*"

In *Cates* v. *Hardacre*, 3 Taunton, 424, which was an action by an endorsee against the drawee of a bill, the witness, Taylor, was asked, "whether that bill had ever "been in his possession before?" He declined to answer for the reason "that he thought his answer to the ques- "tion proposed would have a tendency to convict him of "the offense of usury." He was sustained in his refusal to answer, and verdict went for plaintiff.

A rule to show cause, why a new trial should not be granted on that ground, was made and argued before

Mansfield, C. J., whose opinion is a model of brevity, viz: (p, 425.) "Your questions go to connect the witness "with the bill and they may be links in a chain." *Rule discharged.*

Rex v. *Lewis et al.*, 4 Espinasse, 225, was an indictment for an assault. The prosecuting witness, who was a common informer and a man of suspicious character, (as the case says) on cross-examination was asked "If he "had not been in the House of Correction in *Sussex*. "Lord Ellenborough interposed and said, that that ques- "tion should not be asked, that it had been formerly set- "tled by the judges, * * * that a witness was not "bound to answer any question, the object of which was "to *degrade or render him infamous.* * * * That he "thought the rule ought to be adhered to, *as it would be* "*an injury to the administration of justice*, if persons who "came to do their duty to the public, might be subjected "to improper investigation."

Maloney v. *Bartley*, 3 Campbell, 210, was an action for libel. A witness was called to prove that he had written the libelous paper (an affidavit) by defendant's order and given it to the magistrate, before whom it was sworn to. The witness refused to answer the questions, for the reason that they (the answers thereto) "tended to "criminate himself."

The affidavit was *ex parte* and not in a judicial proceeding. Wood, B. said (page 212): "I think the ques- "tions proposed tend to criminate the witness. * * * "It has been held, that the new delivery of a libel to a "third person by one conscious of its contents, amounts "to a publication and is a criminal offense. I take the "question to be whether the witness was not concerned

"in writing the affidavit and delivering it to the magis-
"trate; and this I am of opinion, he is not bound to
"answer."

In 1 Starkie on Evidence, page 71, the author says: "Upon a principle of humanity as well as of policy, "every witness is protected from answering questions, "by doing which he would criminate himself. *Of policy*, "because it would place the witness under the strongest "temptation to commit the crime of perjury; and *of* "*humanity*, because it would be to extort a confession of "the truth by a kind of duress, *every series and degree of* "*which the law abhors.* It is pleasing to contrast the "humanity and delicacy of the law of England in this "respect with the *cruel provisions* of Roman law, *which* "*allowed criminals and even witnesses in some instances to* "*be put to the torture for the purpose of extorting a con-*"*fession.*"

In the same volume at pages 191, *et seq.*, the subject is further discussed in detail, and many cases are cited which it is not deemed necessary to refer to specifically.

The trial of Sir John Friend for high treason occurred in 1696, and is reported in Vol. 13 of Howell's State Trials, as the first case in the book. The trial was presided over by L. C. TREBY, Justice NEVIL and Justice ROKEBY, and the proceedings are set out very much in detail. A. M. Porter was called as a witness (page 16), and before he was sworn, Sir John, with great persistency, urged that he be permitted to ask the question in substance "whether the witness was a Roman Catholic "or a Protestant." Each of the three justices expressed opinions upon the propriety of the question, substantially concurrent: The last one by Rokeby J. (page 18), is as follows:

"I think it is not a question, that can of right be im-
"posed upon him; he may answer it if he will; but he is
"under no obligation to answer it, *because it may tend to*
"*accuse him of a crime*, for which he may be persecuted
"and likewise will subject him to other penalties, which
"the law cannot compel him to subject himself to."

Upon the trial of the Earl of Macclesfield before the House of Lords, for high crimes and misdemeanor in office, which took place in 1725, and is reported in 16 Howell's State Trials at page 767, the same subject and the rulings in reference to it, are condensed in a brief opinion by Lord C. J. KING (page 1150) as follows: "The question, proposed by the noble Earl to Mr. Mel-
"ler was, whether he knew of any money paid to the
"Great Seal by any master on his admission; and Mr.
"Meller, insisting that he had been a late Master in Chan-
"cery and was not obliged to answer the question, be-
"cause it might tend to criminate himself, the Lords,
"upon the debate, are of the opinion that he is not bound
"to answer the question."

In 1 Greenleaf on Evidence, Sec. 451, the author says:
"In regard to the *privilege of witnesses in not being com-*
"*pelled to answer, the cases are distinguishable into several*
"classes. (1.) When it reasonably appears that the
"answer *will have a tendency* to expose the witness to a
"penal liability, or to any kind of punishment or to a crim-
"inal charge. *Here the authorities are exceedingly clear*
"*that the witness is not bound to answer, and he may claim*
"*the protection at any stage of the inquiry whether he has*
"*already answered the question in part or not at all. If*
"*the fact to which he is interrogated, forms but one link in*
"*the chain of testimony, which is to convict him, he is pro-*
"*tected. And whether it may tend to criminate or expose*

"*a witness, is a point upon which the court are bound to* "*instruct him; and which the court will determine, under* "*all the circumstances of the case, but without requiring* "*the witness to explain how he might be criminated by the* "*answer, which the truth would oblige him to give. For* "*if he were obliged to show how the effect would be pro-* "*duced, the protection which this rule of law is designed* "*to afford him, would at once be annihilated.* But the "court would not prevent the witness from answering it "if he chooses, etc."

Many citiaions of authorities are made in support of the text above quoted, a few of which have already been referred to. Amongst these citations is a considerable quotation (in a foot note) from the rulings and opinion of Chief Justice Marshall, in the case of Aaron Burr, to which the attention of th ccourt is respectfully invited.

See, also,

Phillips on Evidence, 277, and Cowan & Hill's Notes to same, 267.

In Wharton's Criminal Evidence (9th Ed., Sec. 463), the general doctrine is stated in these words: "A witness "will not be compelled to answer any question the reply "to which *would supply evidence* by which he could be "convicted of a criminal offense." Ancient as well as modern cases are referred to in support of the rule as thus stated.

In *Southard* v. *Rexford*, 6 Cowan, 254, the same general question being under consideration, the court by SOUTHERLAND, J., said (p. 260): "In Phillips the "rule is thus stated: 'A witness cannot be *compelled* to "answer any question which has a tendency to expose "him to penalties or any kind of punishment' (1

"Phil. Evidence, 222); (5); and I have found "no case where the object of the question was "to establish a fact material in the cause and not "directly to impeach the character of the witness and "render him incompetent, in which the court have "ever interfered, except upon the application of the "witness." (Cases cited.)

"The language of the judges, in all the cases, is, that "*the witness is not bound* to answer a question which is to "criminate or render him infamous."

In *The People* v. *Mather*, 4 Wend., 229, one of the numererous head-notes (page 232) is as follows: "When "the answer to a question will have a tendency to im- "plicate a witness in a crime or misdemeanor, or will ex- "pose him to a fine or forfeiture, *he is not bound to an- "swer*; and when he claims to be excused from answer- "ing, the court are to determine whether the answer he "may give to the question can criminate him directly *or* "*indirectly, by furnishing evidence of his guilt or by es- "tablishing one of many facts*, which together may con- "stitute a chain of testimony, sufficient to warrant his "conviction, but which *one* fact of itself could not pro- "duce such result; and if they think the answer *may* in "any way *criminate him, they must allow his privilege*, "without exacting from him to explain how he would be "criminated by the answer which the truth may oblige "him to give."

In *Lester* v. *Baker*, 6 Blackf. (Ind.), 439, one of the head-notes, supported by the text of the opinion, is: "A "witness is not bound to answer any question, if his an- "swer will expose him to any criminal punishment or "penal liability."

See also the following cases sustaining the same gen-

eral doctrine, and also further saying that the refusal of the witness (claiming the privilege) cannot be considered as any evidence in the case.

Phelin v. *Kenderdine*, 20 Pa. St., 354.
The State v. *Bailey*, 54 Ia., 414.

The foreging citations (more numerous perhaps than was necessary, but which could be greatly extended to the same effect), have been made for the purpose of showing how deeply the doctrine, that a witness *shall not be compelled* to answer any question, the answer to which would tend to criminate himself or to subject him to penalties or forfeitures, was embodied in the common law of England (in some of the cases designated as the constitutional law of England) prior to the establishment of the independence of this country and how firmly the same doctrine took root in the jurisprudence of the several states.

Some of the citations are made for still another purpose, viz: that under the English system of government, *it was possible*, that, by the tyranny of an administration, this safe and salutary principle of the common and constitutional law of England, could be overridden or put aside.

It is not necessary to advise this court, that the Kingdom of Great Britain, etc., has no constitution in the American sense. Its constitution, if it can be called such, is made up of traditions and customs, the decisions of its courts acquiesced in, concessions, extorted from tyrannical sovereigns and Acts of Parliament, *all of which are subject to control, modification or abrogation by Act of Parliament*. I beg the court will understand, that I am not undertaking to analyze the constitution of England, but

simply to state a proposition, which, in the main, is true. I might, perhaps, better have used the old and accepted phraseology, crystalized into a *maxim* in English law, that "Parliament is supreme." The substance of this is the teaching of Blackstone.

The American colonies were not dissatisfied with the constitution and common law of England, *properly and uniformly administered.* Their claims were, and their dissatisfaction with the English rule grew out of *the fact*, that their rights, as constituents, under the English constitution and the English law, had been violated. What they wanted and insisted upon, was just and equal protection under the constitution and laws of England; and because they believed, that they were deprived of this, the revolution and separation came, and with them, a new and independent government, *and a government with a written constitution*, defining and limiting its administrative powers—the provisions of which neither legislatures nor courts can set aside or disregard, and which are binding alike upon officers and private citizens.

As a matter of history, the constitution of the United States, *which made a government*, as originally adopted, was not satisfactory. It lacked, or was claimed to lack, certain guaranties or provisions in favor of personal rights and personal liberties, which the constitution and laws of England, had upheld and enforced. The fact of the violation of these guaranties and provisions, admitted to be possible under the combined influences of a *despotic* administration, as conceded in some of the cases cited here, was a fact *impressed upon the colonists by personal experience*, and, hence, *the abuse of power* was, with them, a matter to be provided against.

This distrust of unlimited administrative power, led to

the adoption of the first series of amendments to the Constitution of the United States, including Articles 1 to 10 of those amendments, proposed by Congress in 1789, and subsequently ratified, and which are sometimes denominated the "Bill of Rights." They distinctly embody those provisions of constitutional law, so far as then appreciated, which would stand as an effective barrier between the right of the individual citizen and the excessive ambitions or corruptions of administrative power.

In connection with what has been said, I will leave the further explanation of the purpose of these amendments, which include, of course, the fifth amendment, *here especially involved*, to the interpretation of their efficiency by this honorable court, and, in this exact connection, I beg leave to call attention to the case of

Pumpelly v. *Green Bay Co.*, 13 Wall., 166.

This case grew out of the fact, that the defendant in error, by the erection of a dam across a stream, as authorized by the legislature of Wisconsin, had caused the land of the plaintiff to be overflowed, and its value seriously diminished. The defense interposed was the act of the legislature authorizing the erection of the dam in the interest of the public. Upon this defense, apparently, the judgment of the court below had been in favor of the defendant in error. The question presented to this court was a question of constitutional law, and the Constitution of Wisconsin was the only one *directly* involved.

The late Justice MILLER, who delivered the unanimous opinion of the court, speaking of this aspect of the case, says (page 176): "And counsel for defendant, with "becoming candor, argue that the damages of which the "plaintiff complains are such *as the state had the right to*

inflict in improving the navigation of Fox River, with- "out making any compensation for them.

"This requires a construction of the constitution of "Wisconsin; for, although the constitution of the United "States provides that private property shall not be taken "for public use without just compensation, it is well set- "tled, that this is a *limitation* on the power of the federal "government, and not on the states. The constitution of "Wisconsin, however, has a provision *almost identical in* "*language*, viz: that 'the property of no person shall be "taken for public use without due compensation there- "for.' Sec. 13, Art. 1. Indeed, this limitation on the "exercise of the right of eminent domain *is so essentially* "*a part of American constitutional law* that it is believed "that no state is now without it. And the only question "we are to consider is, whether the injury to plaintiff's "property, as set forth in his declaration, is within its "protection."

The above quotation fairly states the case before the court. The provision of the constitution of the United States referred to in the quotation, is a part of article 5 of the amendments.

On page 177, the opinion proceeds as follows: "The "argument of the defendant is, that there was no taking "of the land within the meaning of the constitutional pro- "vision, and that the damage is a consequential result of "such use of a navigable stream, as the government had "a right to for the improvement of its navigation." And the court then says:

"It would be a very curious and unsatisfactory result, "if, in construing a provision of constitutional law, *always* "*understood to have been adopted for protection and secur-*

"*ity to the rights of the individual as against the govern-*
"*ment*, and which has received the commenda-
"tion of jurists, statesmen and commentators,
"*as placing the just principles of the common law*
"*on that subject beyond the power of ordinary*
"*legislation to control or change them, it shall be held that*
"*if the government refrains* from the absolute conversion
"of real property to the uses of the public, it can destroy
"its value entirely, can inflict irreparable and permanent
"injury *to any extent*, can, in effect, subject it to total de-
"struction, without making any compensation, *because, in*
"*the narrowest sense of that word*, it is not taken for the
"public use. *Such a construction would pervert the con-*
"*stitutional provision into a restriction of the rights of the*
"*citizen*, AS THOSE RIGHTS STOOD AT THE COMMON LAW,
"*instead of the government, and make it an authority for*
"INVASION *of private right, under the pretext of the pub-*
"*lic good*, WHICH HAD NO WARRANT IN THE LAWS OR
"PRACTICES OF OUR ANCESTORS."

The bearing of this case upon the present one, is more direct and positive than, at first view, might be supposed. It is true, that the court was giving effect to a provision of the constitution of Wisconsin, as against a law of that state; but at the same time the opinion, admitting it as true, that the constitution of the United States contains, in substance, the same provision, was giving a construction, or rather, an interpretation of the latter and, in so doing, was stating the purposes and effect of similar provisions in all American constitutions. The provisions of the constitution of the United States, to which reference is made, is found in article 5 of the amendments, in close relation to the clause of the same article, which is here involved, and the same history and purposes, and the

same construction must support and defend both. The provision is:

"*No person * * * shall be compelled in any "criminal case to be a witness against himself, nor be de- "prived of life, liberty, or property, without due process "of law; nor shall private property be taken for public "use without just compensation.*"

This is *constitutional* law in the American sense, and the several clauses, the first as well as the last, were *adopted for protection and security to the rights of the individual "as against the government.*" * * * And for the purpose of *placing* the "just principles of the "common law * * * beyond *the power of ordi- "nary legislation to control or change them.*" To trifle with, add to or detract from, such provisions, is to destroy them, and render them mere pretensions, consisting more of sound than of substance.

In the case of *City of East St. Louis* v. *St. John*, 47 Ill., 463, which was a condemnation case, the court, at page 466, says: "The great and essential object of all "governments being to secure individuals in the enjoy- "ment of their rights, that security would not be afforded, "if the property of each individual might be appropriated "to private purposes without his free consent, or what a "municipal corporation, or a collection of individuals, "might choose to declare for public use. Nor should "this security be overlooked in the zeal of public-spirited "persons, in their desire to promote the public good. "This principle, coeval with free government, and upon "which individual security, in the enjoyment of property, "must ever depend, must be held sacred and guarded "with scrupulous care, to render security in the enjoy- "ment of property. In a government of constitutional

" law, this is a right which should never, *under any pre-*
" *text, be violated or disregarded, and if it ever should, then*
" *despotic power, whether wielded by the many or the few,*
" *will have made advances that should alarm all who re-*
" *gard the rights of the citizen and respect our form of*
" *government.*"

The doctrine thus stated is in harmony with the opinion of the court in the case of *Pumpelly* v. *The Green Bay Company.*

In *Boyd* v. *United States*, 116 U. S., Justice BRADLEY speaking for the court, and in reference to the case then before it, uses this language (page 635): "Though " the proceeding in question is divested of many of the " aggrevating incidents of actual search and seizure, yet " as before said, it contains their substance and essence, " and effects their substantial purpose. It may be that it " is the obnoxious thing in its mildest and least repulsive " form; but illegitimate and unconstitutional practices get " their first footing in that way, namely; by silent ap- " proaches and slight deviations from legal modes of " procedure. This can only be obviated by adhering to " the rule, that constitutional provisions for the security " of person and property, should be liberally construed. " A close and literal construction deprives them of half " their efficiency and leads to gradual depreciation of the " right, as if it consisted more in sound than in substance."

In Guisot's History of Representative Government, page 302, it is said:

" Liberties are nothing until they have become rights, " positive rights, recognized and consecrated. Rights, " even when recognized, are nothing so long as they are " not entrenched within guarantees. And, lastly, guar-

"antees are nothing so long as they are not maintained "by forces independent of them, in the limit of their "rights. Convert liberties into rights, surround rights "by guarantees, intrust the keeping of these guarantees "to forces capable of maintaining them, such are the "successive steps in the progress towards a free govern-"ment.

"This progress was exactly realized in England. Lib-"erties first converted themselves into rights; when "rights were recognized, guarantees were sought for "them; and, lastly, these guarantees were placed in the "hands of regular powers. In this way a representative "system of government was formed."

III.

Under the tenth section of the Interstate Commerce Act as amended March 2, 1889, if Counselman obtained for transportation less than regular tariff rates or received drawbacks, he was guilty of a criminal offense, punishable by a fine not exceeding $5,000, and imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court. The act subjects the offender to an *infamous* punishment, and, therefore, attempts to create, out of a business transaction, *an infamous offense*, within the meaning of the law.

Ex parte Wilson, 114 U. S., 417.
Mackin v. *U. S.*, 116 U. S., 348.
Ex parte Bain, 121 U. S., 1.
U. S. v. *DeWalt*, 128 U. S., 393.

In ruling that he was bound to answer the questions propounded to him, the District court, necessarily, determined that Counselman could not invoke the protection

afforded by the fifth amendment of the constitution, which declares that no person "shall be compelled, in any "criminal case, to be a witness against himself."

IV.

The rulings of the district judge, and of the circuit judge upon the *habeas corpus* proceeding, were placed upon the ground that the act of Congress entitled "An "act for the protection, in certain cases, of persons mak- "ing disclosures as parties, or testifying as witnesses," approved February 25, 1868, and incorporated into the revised statutes as section 860, *compelled* Counselman to answer, as it afforded him protection as broadly as does the fifth amendment, *which declares without qualification, that he shall not be compelled to answer.* Or in the language of the Circuit judge in his opinion, "If, however, "there be a *statute*, which declares that the testimony "of a witness in a case or proceeding, shall never be re- "peated against him or his property in any other case or "proceeding, *there is no necessity* for claiming the privi- "lege secured by the amendment." * * *

"*If the protection of section 860 is co-extensive with that* "*of the constitution, the witness is entitled to no privilege* "*under the law.*"

The fallacy of the reasoning lies concretely, as well as abstractly, in this. *The constitution* grants a privilege or immunity. *Legislation* may possibly add to the privilege or immunity, *but it cannot detract from it.* The right, as the constitution leaves it, *must be respected in its broadest application.* The reasoning leads up to the absurdity, that legislation may make a *proviso or condition* to a *constitutional provision*, and limit its force and signification.

Suppose the reasoning to be put into the form of a syllogism.

1. The constitution is the supreme law of the land, in subordination to which all legislation must be had, and the constitution provides, that "*no person shall be compelled, in any criminal case, to be a witness against himself.*"

2. Legislation has provided, that testimony voluntarily given by a witness, tending to criminate himself, shall not be used against him. *Ergo.*

3. The constitution is amended and the witness may be *compelled* to testify against himself.

Is this good reasoning upon constitutional law? The syllogism could be varied in many ways; but, in the one given, the more important elements of the controversy are involved. The constitution says "no person shall be compelled," etc. Legislation, under the construction given to it, says "everybody may be compelled," etc. If legislation is superior to and may override the constitution, the construction is right. If the constitution controls and limits legislation, and is *superior to it*, the construction is manifestly wrong. The constitution of the United States provides for amendments, and the method of procedure necessary to the making of such amendments. *A mere act of Congress is not the method specially pointed out or sanctioned, nor is it admissible.*

Allow me to press this question a little further. The constitutional provision is without qualification. *It is an absolute prohibition.* It is admitted, that a *proviso* might have been added to that article to the effect, that, *if legislation shall provide*, that criminating evidence, extorted from an unwilling witness, should not be used against

him, then the witness *might be compelled*, by legislation, to give evidence against himself, or tending to incriminate him, legislation, *conformable* to such a *proviso*, would enable the courts to become Star Chambers and inquisitions; but can a mere act of Congress engraft such a *proviso* upon the *constitutional prohibition* and thereby *amend* the constitution by adding a *proviso* to it? The question is a *serious* one, possibly not personally serious in the present case, but a *grave* one, which has been pushed aside in some cases, that have arisen in the courts, since the Dartmouth College case was decided. If legislation and the decisions of courts, can fritter away the plain provisions of constitutional law, and render them ineffective for the protection of private rights, *specifically guaranteed*, then this country is in the control of legislation and courts, and its constitution is a "*dead letter*." We reach this point somewhere in the tendency of the decisions of the district and circuit judges, whose opinions are involved in the consideration of this case. *Extreme* results must be considered in determining their propriety. These results are, *immediately*, a breaking down of *constitutional guarantees*, and we need not now stop to consider future and further consequences.

The invasion, if permitted to begin, widens as it progresses. It is best met at its initial point. We do not need to travel into any of the refinements of ethics in order to reach the substantial meaning of words. Constitutional provisions, in behalf of individual rights, are entitled to have liberal construction in favor of the citizen. In this respect the case of *The People ex rel.* v. *Kelley*, 24 N. Y., 74, which has heretofore been much relied upon by counsel for the appellee, is a conspicuous illustration of an *unguarded and intemperate* view of an important ques-

tion of constitutional law. The opinion in that case is by Judge Denio, who was then, and still is credited by the courts, and the profession with a large degree of ability and integrity. His opinion in the earlier parts of it, justify this estimate of him, but after admitting something, at least, of the constitutional protection which is contended for in this case, the opinion says (page 83): "But neither the law nor the constitution *is so sedulous to* "*screen the guilty as the argument supposes. If a man* "*cannot give evidence upon the trial of another person,* "*without disclosing circumstances which will make his own* "*guilt apparent, or, at least capable of proof, though his* "*account of the transactions should never be used as evi-* "*dence, it is the misfortune of his condition, and not any* "*want of humanity in the law.*" The quotation contains the controlling idea of the judgment in that case. It was an idea that might be pressed by a prosecuting attorney, in a case in which a jury are judges of the law and the facts. It does not appear well, in the judgment or opinion of a court. The suggestion of Judge Denio, "but neither "the law nor the constitution is so sedulous to screen the "guilty as the argument supposes," *as a turning point in that case*, condemns the results of the opinion. That suggestion controlled that case. Its influence should go no further than the particular case. The very substance of the constitutional provision was ignored by it, and the assumption was indulged in, *that a witness*, who claimed his *constitutional privilege* of refusing to answer questions, the answers to which would tend to criminate him, *was a criminal in fact, and therefore, entitled to none* of the privileges or protections guaranteed to him by the constitution. Leave that assumption out of consideration, which upon the point here involved, contains as bold and incon-

siderate a statement as could have ever emanated from an attorney in the heat of debate, and nothing is left of the case, as authority, (so-called), deserving of consideration, in opposition to the rights of the appellant as claimed in this proceeding.

As an abstract idea of morality, I might agree with Judge Denio's suggestion, which is now objected to, in the relations in which it stands. It is objected to, because, if it is fair and right, it disembowels the constitutional privilege, and only ghastly remains of it are left, to be the playthings of judicial, or administrative forces. Properly construed, *the constitutional privilege may screen a guilty man.* It was aimed at a greater evil than this, viz.: *the prevention* of the Star Chamber and the Inquisition. The lesser evil was subordinated to the greater good; and the whole provision of the fifth amendment was in view of an *experienced tendency* in the administrative forces of government, to use their powers, *unless restrained*, to the *oppression and disgrace* of the subject or citizen. The constitutional provision is *prohibitory*. It is not *palliative* of an offense, or *in condonation of it*. It reaches out to and prohibits a kind of evidence, *which had been abused and grossly abused in the past, and closed the door* to that class of evidence. The key to open that door was deposited neither with a court nor with Congress, and "He that entereth not by the door unto the sheep-fold "but climbeth up some other way, the same is a thief "and a robber." The seals and lock can be broken in only one way, viz.: by an amendment to the constitution, adopted as the constitution itself provides. Revolution does not fall within the idea intended to be conveyed.

V.

Inasmuch as the special wording of state constitutions may seem to be involved in a proper understanding of the opinions of state courts, to which reference has been and may hereafter be made on either side of this controversy, it is thought *admissible*, at least, to refer to the language of the constitutions of some of the several states, whose decisions may be thus availed of. It is needless to suggest, that the *direct* question, here presented, has never been passed upon by this court. It, therefore, comes as *approximately* a new case; and the opinions of state courts and subordinate courts of the United States are entitled to only such weight and influence, as their intelligent reasonings and discriminations and comprehension of the situation may show them to be entitled to.

In some of the state constitutions *no provision is found*, corresponding to the clause of the *fifth* amendment of the constitution of the United States, which is here *specially* invoked. This seems to be true of the states of NEW JERSEY and GEORGIA, and, perhaps, others.

The constitutions of Massachusetts and New Hampshire, in this respect, seem to be identical, viz: "No "subject shall be held to answer for any crimes or of- "fense, until the same is fully and plainly, substantially "and formally described to him, *or be compelled to accuse* "*or furnish evidence against himself*."

The wording of the constitutions of New York and Illinois is, and, for many years has been, substantially identical with the constitution of the United States, in the provision here involved.

In the state of Virginia, the provision is, that "*In all* "*capital or criminal prosecutions a man hath a right to*

"*demand the cause and nature of his accusation* * * *
"*nor can he be compelled to give evidence against him-*
"*self.*"

The constitution of Tennessee, in its bill of rights, (Art. 1, Sec. 9), says, "*That in all criminal prosecu-*
"*tions, the accused* shall have the right to be heard by
"himself and his counsel * * * *and shall not be com-*
"*pelled to give evidence against himself.*"

The provision of the constitution of Arkansas upon this subject, seems always to have been in all respects identical with the constitution of Tennessee.

The constitutions of Pennsylvania, of 1790, 1838 and 1873, are, in this respect, substantially in the same words as the constitution of Tennessee above quoted.

The constitutions of Maryland, both that of 1776, and that of 1851, contain this clause; "*No man ought to be com-*
"*pelled to give evidence against himself in a court of com-*
"*mon law, or in any other court, but in such cases as have*
"*been usually practiced in this state, or may hereafter be*
"*directed by the legislature.*"

The constitution of Indiana of 1851 (Sec. 14, Art. 1) says: "No person shall be put in jeopardy twice for the
"same offense. *No person in any criminal prosecution*
"*shall be compelled to testify against himself.*"

Without pursuing further this reference to state constitutions, it is already made evident, that such constitutions are not identical in phraseology upon the question now under consideration; that, in one or more of the states, the matter is subject to the control of legislation, and, therefore, might be reached and operated upon by legislative enactments. Authorities from such states, or from states, in which the constitutions are silent upon the

subject, should be of no effect in a discussion of the question here to be considered and decided: for it is admitted, that a rule of the common law, *as such merely*, is subject to legislative modification and control; and it is only when the "*just principles of the common law*" are protected and made secure by constitutional provisions, that they are placed "*beyond the reach of ordinary legis-*" *lation.*"

The provisions of the constitutions of Massachusetts, New Hampshire, Virginia, Tennessee and Arkansas, would seem to be substantially the same in meaning and intended to accomplish the same purposes, as the provisions of the constitutions of the United States, New York and Illinois, notwithstanding the differences of phrascology. Their evident purpose was to prevent *the compelling* of testimony of a criminating character from a party, or a witness, and the liberal construction, which should be placed upon constitutional provisions in behalf of the citizen, would seem to demand, that the guaranties of constitutional law, evidently designed to accomplish the same results, although differently worded, should have the same interpretation. The refinements of philology have no place for intervention in such cases.

VI.

THE COMMON LAW RULE AND THE CONSTITUTIONAL PROVISION ARE NOT LIMITED, IN THEIR APPLICATION, TO CASES IN WHICH THE PERSON CALLED AS A WITNESS IS HIMSELF A PARTY.

In nearly all the cases at law already referred to, as well as in those, which will hereafter be cited, the persons, whose testimony was sought, and who claimed the privilege of

refusing to answer, were witnesses *merely*. Some of the cases related to examinations before grand juries, others to examinations in actual trials before courts and petit juries, and one, at least (a Massachusetts case hereinafter referred to), was an examination before a legislative committee. The common law rule and the constitutional provision were held to be applicable to all the different conditions thus presented. The provisions of constitutional law, involved in these several state cases, were, of course, provisions of state constitutions, which, in language, are not identical. In some, no provision is found corresponding to the special clause of the fifth amendment of the Constitution of the United States, which is here especially invoked. Bearing in mind these differences, I call the attention of the court to the following cases:

Emery's case' 107 Mass., 172, 184.
Cullen v. *Commonwealth*, 24 Grattan, 624.
State v. *Nowell*, 58 New H., 314.
Boyd v. *U. S.*, 116 U. S., 616.
Temple v. *Commonwealth*, 75 Va., 892, 902.

The Massachusetts case, the New Hampshire case and the Virginia case, are broad enough to cover the conditions of this case, and if followed, *to compel a reversal* of the present judgment. Take them as they stand, grounded upon provisions of state constitutions, and the rulings and judgment of the Circuit court, in this case, *cannot be sustained.*

Both the Massachusetts case and the case in 24 Grattan, refer to the case of *The People ex rel, etc.* vs. *Kelly*, 24 N. Y. already mentioned. The Massachusetts case, yielding something, probably, *by way of courtesy only*, to the results of the Kelly case in New

York, *mildly* attempts to ignore those results by reference to the difference in phraseology between the constitutions of the two states. The Virginia case adopts a part of the reasoning of the New York case (which is the only sensible part of it) *but repudiates its conclusions*.

The New Hampshire case and the case of *Boyd* v. *U. S.* rest upon conditions peculiar to themselves. It would be unfair to assert, that they were concurrent as to their facts. Conditions were widely different. The Boyd case is the wider in its application of constitutional principles, and, although the Massachusetts, New Hampshire and Virginia cases *absolutely* demand the reversal of the present judgment against Mr. Counselman, leaving something for just criticism in their construction of constitutional law, the Boyd case seems to have adopted a more generous and, therefore, a more appropriate construction of constitutional provisions, which reaches to the very foundation of the right of courts, grand juries, commissioners, legislative committees and all investigating bodies, *to compel* from a party or witness incriminating evidence against himself. All of these cases seem to have received very careful consideration, but with reference, of course, to the special facts before the respective courts. The Boyd case is referred to, not only for its general exposition of constitutional law, *deemed by the profession to be authoritative*, but, also, because in the course of the discussion of the rights of the citizen under constitutional guaranties, the court, by Justice BRADLEY, covering the ground of compulsory evidence (page 630) says: "In this regard the fourth and fifth amendments "run almost into each other." *And this is true.* The opinion of Mr. Justice Bradley, not dissented from, in any part of it here material, is, therefore, applicable to the

present case, which, in its general outlines, involves only the interpretation and application of the fifth amendment.

The Emory case (107 Mass.) was as much like the case of Counselman, barring the distinction (whatever that may amount to) between a proceeding of a criminal nature before a legislative committee and a similar proceeding before a grand jury. The distinction makes no difference in principle, and I do not expect this court to be possessed of the philological acuteness, in the interpretation of constitutional law, which was illustrated by a learned judge of the Supreme court of Illinois (without dissent), in a case, reported with all the formalities of a judicial opinion, in which the judgment was reversed, because, in an instruction given to the jury, it was said: "*If* "*the jury are satisfied from the evidence*," etc., instead of saying: "*If the jury believe from the evidence*," etc. Such refinements upon words must be left to judges in Illinois and Kansas. No rivalry of interpretation, or application of the law, can reach such a case, any more than it can reach the various opinions in the Munn and Scott case. *Abstract force* in judicial opinions, cannot be contended against. It ends all reasoning. The doctrine of *stare decicis*, easily set aside by the judgment of a court, when it pleases to do so, becomes the very ground-work of judicial authority, when it falls into line with personal theories adopted for reasons, which can never be explained. But let us see what the cases referred to, do actually decide, and how they range themselves with respect to the rights and privileges of Mr. Counselman, as presented by this record.

In Emory's case, 107 Mass., Emory was called, as a witness, before a legislative committee, appointed "to in-"quire if the state police is guilty of bribery and corruption."

He came before the committee in obedience to its summons, and there declined to answer the following question: "2d. Have you ever paid any money to any state "constable, and do you know of any corrupt practice or "improper conduct of the state police? If so, state fully "what sums, and to whom you have thus paid money, "and also what you know of such corrupt practice and "improper conduct."

The refusal to answer was placed upon the ground, that the answer would furnish evidence against the witness, by which he could be convicted of an offense against the law. Persisting in his refusal to answer the question, he was arrested upon a warrant, issued by the President of the Senate, and held in custody by the sergeant at arms. The case came before the court upon his petition for *habeas corpus*, to be relieved from the confinement in which he was held. The learned judge, before whom the petition was presented, held the case under advisement for consultation with his brethren of the bench, and the opinion pronounced, seems to have been the *unanimous* opinion of all of the judges of the Supreme Judicial Court of Massachusetts, his Honor Mr. Justice Gray being at that time a member of that court. The result of the hearing was, that the petitioner was discharged from his confinement and set at liberty by the order of the court. In the course of the opinion, which is by Justice Wells, there is some discussion, not here applicable, as to the difference between a contempt and subsequent punishment for failure to answer before a legislative committee and a failure or refusal to answer before a court, or in the progress of a judicial proceeding. The result of that discussion is, that the difference of situation made no difference in the application of the law, and in speak-

ing of the constitutional provision of Massachusetts, the learned judge, after quoting that provision as hereinbefore given, says (page 180): "The whole article has "such reference to proceedings for the punishment of "criminal offenses as to justify the designation in the "margin by the two words, '*Prosecutions regulated.*' "But in that relation the sentence above quoted from the "article plainly presents three distinct aspects. The *first* "branch of the sentence defines the conditions upon "which alone the subject can be put upon his trial "for any offense. The *second* forbids that he should be "compelled to accuse himself. By the *narrowest con-* "*struction* this prohibition extends to all investigations of "an *inquisitorial* nature, instituted for the purpose of "discovering crime or the perpetrators of crime, *by put-* "*ting suspected parties upon their examination in respect* "*thereto, in any manner*, although not in the course of "any pending prosecution.

"*But it is not even thus limited.* The principle applies "equally to any *compulsory* disclosure of his guilt by "the offender himself, whether sought directly, as the "object of the inquiry, or *indirectly and incidentally*, for the "purpose of establishing facts involved *in an issue be-* "*tween other parties.* If the disclosure, thus made, "*would be capable of being used* against himself as a con- "fession of crime, or an admission of facts tending to "prove the commission of an offense by himself, in any "prosecution then pending, or *that might be brought* "*against him therefor, such disclosure would be an ac-* "*cusation of himself, within the meaning of the constitu-* "*tional provision.* In the absence of regulation by statute, "the protection against such self-accusation is secured by "according the guilty person, when called upon to an-

"swer as witness *or otherwise*, the privilege of then avow-
"ing the liability and claiming the exemption; *instead of*
"*compelling him to answer and then excluding his admis-*
"*sions so obtained, when afterwards offered in evidence*
"*against him.*

"This branch of the constitutional exemption, corres-
"ponds with the common law maxim *nemo tenetur se-*
"*ipsum accusare*, the interpretation and application of
"which has *always* been in accordance with what has
"been just stated. Broom Max. (5th ed.) 968; Win-
"gate Max. 286; Rose. Crim. Ev. (2d Am. ed.) 159; Stark
"Ev. (8 Am. ed.) 41, 204; and notes, 1 Greenl. Ev. Sec.
"451, and notes.

"A like interpretation has been given to a provision in
"the constitution of the state of New York, which in
"terms, is more restricted than the one under considera-
"tion, to wit: That no person 'shall be compelled, in any
"criminal case, to be a witness against himself.' (N. Y.
"Const. of 1846 Art. 1, Sec. 6.) In the case of *People*
"v. *Kelly*, 24 N. Y., 74, it was held, *that this clause pro-*
"*tected a witness from being compelled to answer to mat-*
"*ters that might tend to criminate himself*, when called to
"testify against another party. And in *People* v. *Mather*,
"4 Wend., 229, this exemption was declared to extend
"to the disclosure of any fact, which might constitute an
"essential link in a chain of evidence by which guilt
"might be established, although that fact alone would not
"indicate crime.

"The *third* branch of the provisision in the constitu-
"tion of Massachusetts, '*or furnish evidence against him-*
"*self*,' must be equally extensive in its application, and, in
"its interpretation, may be presumed to be intended to
"add something to the significance of that which pre-

"cedes. Aside from this consideration, and upon the lan-
"guage of the proposition, standing by itself, it is a rea-
"sonable construction to hold, *that it protects a person*
"*from being compelled to disclose the circumstances of his*
"*offense, the sources from which, or the means by which*
"*evidence of its commission, or of his connection with it, may*
"*be obtained or made effectual for his conviction without using*
"*his answers as direct admissions against him.* For all prac-
"tical purposes, such disclosures would have the effect to
"furnish evidence against the party making them. They
"might furnish the only means of discovering the names
"of those who could give evidence concerning the trans-
"action, the instrument by which a crime was perpe-
"trated, or even the *corpus delecti* itself."

At page 183, speaking of committees of legislatures, the opinion proceeds: "Such tribunals can in no case "disregard this rule of protection. *The legislature can-*
"*not, by the most formal and solemn enactments of law,*
"*authorize them to do it.* If, then, the legislature can-
"not, by the formal enactment of all its branches, subject
"a citizen to such compulsory disclosure, it is difficult to
"see on what ground of argument or inference, from ne-
"cessity, propriety, *or the nature of constitutional repub-*
"*lican government*, authority can be deduced for either
"branch of the legislature to do so by its mere order.

"*The protection of the subject is not secured by the con-*
"*stitution*, if it may be so invaded. The range of in-
"vestigation, which is open to inquiry by the legislature,
"is unlimited. It is the general court of the common-
"wealth; entitled to enquire into the condition and
"efficiency and mode of operation of all administrative
"departments of the government of the state, the proper
"execution of the laws, and all that concerns the public

"welfare. If other means of discovering offenses and "convicting offenders are thought to be inefficient or un- "satisfactory, investigations by direct authority of the "legislature, prompted by public complaints, and intended "primarily to furnish information, upon which that body "may act in remedying abuses in the administration of "public affairs, *may easily be perverted* into an effective "means of procuring material to aid in the institution and "maintenance of criminal prosecutions. Committees of "the legislature, or commissioners acting under its order, "to inquire into any supposed failure to enforce the laws, "*if freed from the restrictions of the constitution in this* "*particular*, may be found useful and efficient as "auxiliaries of the grand juries of the commonwealth. "*In this way*, parties, exposed to prosecutions, would find "their *constitutional protection to have failed them.* It is "the *capability* of abuse, and not the *probability* of it, "which is to be regarded, in judging of the reasons, "which lie at the foundation, and guide in the interpreta- "tion of such constitutional restrictions."

At page 184 the opinion says: "But the rule of the "common law did not control parliamentary inquiries, *for* "*the simple and obvious reason*, that the authority of par- "liament was more potent than the common law, and "might change, annul or suspend its restrictions, as that "body should determine. The exception is not confined "to investigations relating to the business of parliament, "but extends to all those in which it authorizes a disre- "gard of the common law rule, *before whatever tribunal* "*they are authorized to be conducted. It is because the* "*constitution of Massachusetts is more potent and above,* "*not only the common law but the legislature also: con-* "*trolling all tribunals and all departments of the govern-*

"*ment alike*, as well as all inhabitants of the common-
"wealth; that *this safeguard of individual rights cannot be*
"*suspended or invaded*, either by general laws, or the
"special order of the legislative body, or of any of its
"branches.

"It is to be observed, *that the provision relates to the*
"*privileges of the subject*, and not to the authority of any
"tribunal or body before which inquisition may be made.
"*It places a limit* upon all inquiry, to which he may be
"subjected, not by defining the extent of the authority
"by which it is made, but, *by surrounding him with a*
"*privilege of exemption, which cannot be set aside by any*
"*authority without his own consent. It excludes the leg-*
"*islature as well as the courts.* It follows, also, that in its
"exercise it is regulated by the same rules in legislative
"investigations, as in judicial or other inquiries."

After referring to the case of the *People ex rel, etc.* v. *Kelly*, 24 N. Y., and suggesting a distinction between the provisions of the New York and Massachusetts constitutions (which is not readily assented to) the opinion proceeds, (p. 185.): "The terms of the provision, in the con-
"stitution of Massachusetts require a much broader inter-
"pretation as has already been indicated; and no one can
"be required to forego an appeal to its protection, unless
"first *secured from future liability and exposure, to be*
"*prejudiced* in any criminal proceeding against him, as
"fully and extensively, *as he would be secured by availing*
"*himself of the privilege accorded by the constitution.*
"Under the interpretation already given, this cannot
"be accomplished *so long as he remains liable to prosecu-*
"*tion, criminally, for any matters or causes in respect*
"*of which he shall be examined, or to which his testimony*
"*shall relate.* It is not done, in direct terms, by the stat-

"ute in question; it is not contended that the statute is "capable of an interpretation which will give it that ef- "fect; and it is clear that it cannot and was not intended "so to operate. Failing, then, to furnish to the persons "to be examined, an exemption equivalent to that con- "tained in the constitution; *or to remove the whole liability*, "against which its provisions were intended to protect "them; it fails to deprive them of the right to appeal to "the privilege therein secured to them.

"The result is, that, in appealing to his privilege, as "an exemption from the obliga ion to answer the inquiries "put to him, *the petitioner was in the exercise of his con-* "*stitutional right:* and his refusal to answer upon that "ground, was not and could not be considered, as dis- "orderly conduct, or a contempt of the authority of the "body before which he was called to answer."

In the case of *State* v. *Nowell*, 58 New Hampshire, under the identical provision of constitutional law, as was in force in Masachusetts, the legislature of New Hampshire had passed an act providing as follows: "No clerk, "servant or agent of any person accused of a violation of "this chapter, shall be excused from testifying against "his principal for the reason that he may thereby crimi- "nate himself. But no testimony so given by him shall "in any prosecution be used as evidence, either directly "or indirectly against him. *Nor shall he be, thereafter,* "*prosecuted for any offense so disclosed by him.*"

Nowell, it seems, was a clerk for a man by the name of Goodwin, and was called to testify, *before a grand jury*, upon a charge, evidently under investigation there against Goodwin, for selling spirituous or intoxicating liquors, and he was asked, whether, as such clerk, he had sold spirituous or intoxicating liquors, and whether Goodwin

sold or kept the same for sale, and declined to answer on the ground that his evidence might tend to criminate himself. The opinion of the court, which is brief, dwells, *entirely, upon the absolute immunity from prosecution in respect to a criminal offense*, accorded to the witness by the New Hampshire statute, and he was *compelled or required to answer the question for the reason*, that he was relieved by the statute from any possibility of prosecution *in respect to any matter which might be disclosed by his evidence*. The case, therefore, is, in its teachings, substantially the same as the Massachusetts case.

The case of *Cullen* v. *The Commonwealth*, 24 Grattan, was the case of *an indictment*, sent to the grand jury of the Hustings court of the city of Richmond, against Meredith, Royal and others, for the murder of John B. Mordecai, in a duel. Dr. Cullen was called before the *grand jury* as a witness in that case, but declined to answer an apparently broad question, as to what he knew of the duel between W. P. McCarty and John B. Mordecai. He declined to answer, because, *answering the question would tend to criminate him*. He was attached for his refusal by the Hustings court, and ordered to be imprisoned and pay a fine, and, from that judgment, he obtained a writ of error, which was made a *supersedeas*. He invoked the protection of the Constitution of Virginia as a justification for his refusal. The court says, in passing upon the case (p. 626): "The question is, "was Dr. Cullen guilty of contempt of the Hustings "court in refusing, for the reasons stated by him, to make "the disclosure called for by the *grand jury* and ordered "by the court? It is insisted by his counsel that he was "not, *because he has a right guaranteed by the Constitu-"tion of the state, of which neither legislature nor courts*

"*can deprive him*, to refuse to answer any question, the "answer to which would tend to criminate him; and "such, it is contended, would be the effect of an answer "to the interrogatory propounded. Is there such con- "stitutional right?

"*The right to refuse* to answer such questions before "any judicial tribunal, *was the well settled law of England* "*long before the separation of the American colonies from* "*the mother country;* but the State of Virginia, ever fore- "most in proclaiming principles of personal liberty and "security, and providing safeguards to *individual rights*, "was unwilling when she assumed the attitude of an in- "dependent and sovereign state, to leave this great prin- "ciple, and others of kindred character, subject, as at "common law, *to the mutations of legislative will, or to* "*the hazard of judicial discretion.*"

Quoting from the Constitution of Virginia in the same language heretofore given, the opinion proceeds (p. 627):

"This section was framed nearly one hundred years "ago by 'men of the days gone by.' It was framed "*for the protection of the citizen, and announced great* "*principles of individual right*, to be secured to the peo- "ple of Virginia and their posterity forever; and it "stands to this day, untouched in word, syllable or letter "a part of our state constitution, and *a bulwork and safe-* "*guard to the citizen*, having, for nearly a century, with- "stood the shock of revolution and the rage of innova- "tion. The earnest and eminently wise and practical "men, who framed that declaration, certainly meant "something when they solemnly declared, that a man "shall not be compelled to give evidence against himself. "They were not issuing a mere *brutum fulmen*. On the "contrary, we think, that it was their purpose to proclaim

" and render inviolable, a great practical *individual right*
" —to declare, *as part of the organic law, that no man*
" *should anywhere, before any tribunal, in any proceeding,*
" *be compelled to give evidence tending to criminate him-*
" *self, either in that or any other proceeding.* In other
" words, to make the common law thus extended to all
" cases—parliamentary as well as judicial—a part of the
" organic law of the state. And we think it would be
" unjust to the men who framed, and to the men who
" have so long preserved intact that important provision,
" *were we to confine it only to cases in which a man was*
" *called on to give evidence against himself in a prosecution*
" *pending against him. This would indeed be to dwarf*
" *the spirit and meaning of a great principle, to the most*
" *insignificant proportions, and would scarcely be in char-*
" *acter with the earnest, wise and practical men, who pro-*
" *claimed it.* They, certainly, would scarcely have
" thought it necessary to guard in their organic law
" against an evil which had occurred in no civilized com-
" munity within the memory of men then living, and at
" the same time to leave *to the mutations of legislative*
" *will*, the protection of the citizen from being compelled
" to give evidence against himself in proceedings against
" others—*an evil of a very practical character, and lead-*
" *ing directly to the same result—self accusation. We do not*
" *feel warranted in giving any such narrow and restricted*
" *construction to this declaration. It would render the*
" provision wholly nugatory; and we do not think it is
" required, as has been contended, by the grammatical
" structure of the section."

At page 631 the opinion proceeds: " We have been
" pointed to the judicial decisions of but two states, Mas-
" sachusetts and New York, on the question before us,

"and our conclusions are sustained by the Supreme "courts of both states. Emory's case, 107 Mass. R., 172, "and the *People* v. *Kelly*, 24 N. Y., 74.

"The terms of the New York constitution are far "more restricted than our own. They are as follows: "'That no person shall be compelled, in any criminal "case, to be a witness against himself;' and the argu- "ment as to the grammatical sense of the clause was "earnestly pressed upon the court."

Then follows a quotation from the opinion of Judge Denio, but which does not include *the questionable sentiment of that opinion, upon which alone the decision of the case was founded.* The opinion at page 633 proceeds as follows:

"This important privilege being thus guaranteed to "the citizen by the constitution, the next question is, is "the case before us a proper one for its exercise?

"It is contended by the attorney general, that it is not, "because, by the act of October 11, 1870, entitled 'An "act to amend and re-enact section 1, chapter 12, of "the code of Virginia (1860), with regard to dueling,' "it is enacted, among other things, as follows: 'Every "person, who may have been the bearer of such chal- "lenge or acceptance, or otherwise engaged or con- "cerned in any duel, may be required in any prosecu- "tion against any person but himself, for having fought "or aided or abetted in such duel, to testify as a wit- "ness in such prosecution; but any statement made by "such person, as such witness, shall not be used against "him in any prosecution against himself.' And it is "insisted by the attorney general, that the testimony of "no such witness can tend to criminate himself, because "no statement made by him can be used as evidence "against him in any prosecution against himself."

In commenting upon this statute and its effects upon the constitutional provision, the court at page 635 says: "The privilege claimed in this case is one, as we have "seen, which was not only allowed by the courts, but "which for near a century has been carefully guaranteed "by the constitution. *Whether such constitutional privil-*"*ege can be taken away by the legislature at all, on any* "*terms of indemnity*, is a question not necessary to be "now decided. *But we are all clearly of opinion, that be-*"*fore it can be taken away there must be absolute indemnity* "*provided, and that nothing short of complete amnesty to* "*the witness—an absolute wiping out of the offense as to* "*him, so that he can no longer be prosecutad for it—will* "*furnish that indemnity*. WE DO NOT THINK THE ACT "OF ASSEMBLY REFERRED TO FURNISHES SUCH INDEMNITY. "It only provides that the '*statement*' made by the wit-"ness shall not be used against him in a prosecution "against himself. Now, it is apparent, that, *without us-*"*ing one word of that statement*, the attorney for the "commonwealth might, in many cases, and, in a case like "the present, inevitably would, be led by the testimony of "the witness, to means and sources of information, "which might result in criminating himself. *This would* "*be to deprive him of his privilege without indemnity.*

"We are of opinion, therefore, that the act of assembly "aforesaid, failing to afford *complete* indemnity, does not "deprive the plaintiff in error of his constitutional priv-"ilege."

At the close of the opinion, and in deciding upon the reasonings above indicated the court says (p. 638.): "The "result is, that in refusing to answer the interrogatory "propounded, Dr. Cullen was exercising a privilege *se-*"*cured to him by the constitution*, and was not guilty of a "contempt of court.

"Judgment of Hustings court reversed, and cause re-
"manded, with instructions to allow the witness his priv-
"ilege of declining to make the disclosure called for, if
"insisted on by him."

In the case of *Temple* v. *The Commonwealth*, 75 Va., Temple had been called as a witness upon the trial of one Berry for his complicity in a lottery, and refused to testify in answer to certain questions propounded to him, on the ground, that by so doing, he would criminate himself. He had already testified before the grand jury. The Hustings court insisted on his answering the questions, and, persisting in his refusal, he was held to be in contempt of the authority of the court, and was sentenced to pay a fine of fifty dollars and be confined in the jail for twenty days. From this sentence, an appeal was taken to the Court of Appeals of Virginia. The opinion of the majority of the court in that case, fully adopts and confirms the opinion in the Cullen case already referred to, and, moreover, holds, that the fact, that Temple had already testified before the grand jury, was not a waiver of his privilege. The court, at page 898, uses this language:

"A man, having a privilege, secured to him by the
"constitution, cannot be required to waive that high con-
"stitutional right upon the suggestion either by the court,
"*who had no right to make it, or by the commonwealth's*
"*attorney, who is powerless to redeem his pledge*, that, *per-*
"*adventure*, no prosecution would be instituted against
"him. *He has a right to stand upon his constitutional*
"*privilege*, and to remain silent whenever any question is
"asked him, the answer to which *may tend to criminate*
"*himself*."

Reference is made to the opinion of Chief Justice Marshall in the Burr case, to the *People* v. *Mather*, 4 Wend., and to other cases pertinent to the subject.

The case of *Boyd* v. *The United States*, arose under peculiar provisions of the revenue laws of the United States of 1874, and related mainly to the question of the validity of that law under the *Fourth* Amendment to the Constitution. The opinion, by Mr. Justice Bradley, gives, at considerable length, the history of the conditions which led up to the adoption of the Fourth and Fifth Amendment to the Constitution of the United States, and makes extensive quotations from the opinion of Lord Camden, delivered in the case of *Entick* v. *Carrington et al.*, decided in 1765, and reported in 19 Howell's State Trials, 1029; and of that opinion the court says, page 630:

"The principles laid down in this opinion affect the "very essence of constitutional liberty and security. "They reach farther than the concrete form of the case "then before the court, with its adventitious circum- "stances; they apply to all invasions on the part of the "government and its employes, of the sanctity of a man's "home and the privacies of life. It is not the breaking "of his doors and the rummaging of his drawers, that "constitutes the essence of the offense; *but it is the in-* "*vasion of his indefeasible right of personal security, per-* "*sonal liberty and private property*, where that right has "never been forfeited by his conviction of some public "offense—it is the invasion of this sacred right, which "underlies and constitutes the essence of Lord Canden's "judgment. Breaking into a house and opening boxes "and drawers are circumstances of aggravation; *but any* "*forcible and compulsory extortion of a man's own testi-*

"*mony* or of his private papers, to be used as evidence "to convict him of crime, or to forfeit his goods, is with- "in the condemnation of that judgment. In this regard "the fourth and fifth amendments run almost into each "other."

At page 631, the opinion proceeds: "And any *com-* "*pulsory* discovery by *extorting* the party's oath, or *com-* "*pelling* the production of his private books and papers, "to convict him of crime, or to forfeit his property, *is* "*contrary to the principles of a free government.* It is "abhorrent to the instincts of an Englishman; it is ab- "horrent to the instincts of an American. It may suit "the purposes of despotic power; but it cannot abide the "pure atmosphere of political liberty and personal free- "dom."

Referring to the act of 1874, which, the opinion says, was intended as a revisory act on the subject of revenue frauds and prosecutions therefor, it proceeds, page 633:

"Reverting, then, to the peculiar phraseology of this "act, and to the information in the present case, which "is founded on it, we have to deal with an act, which ex- "pressly excludes criminal proceedings from its operation "(though embracing civil suits for penalties and forfeit- "ures), and with an information, not technically a crimi- "nal proceeding, and neither, therefore, within the *lit-* "*eral* terms of the *Fifth* Amendment to the Constitution "any more than it is within the *literal* terms of the *Fourth.* "Does this relieve the proceedings or the law from being "obnoxious to the prohibitions of either? We think not: "*we think they are within the spirit of both.*

"We have already noticed the intimate relations be- "tween the two amendments. They throw great light

"on each other. For the '*unreasonable searches and* "*seizures*' condemned in the fourth amendment are al- "ways made for the purpose of compelling a man to give "evidence against himself, which, in criminal cases, is "condemned in the fifth amendment; and compelling a "man '*in a criminal case to be a witness against himself*,' "which is condemned in the fifth amendment, throws "light on the question as to what is an 'unreasonable "search and seizure' within the meaning of the fourth "amendment. And we have been unable to perceive, "that the seizure of a man's private books and papers to "be used in evidence against him, *is substantially different* "*from compelling him to be a witness against himself. We* "*think it is within the clear intent and meaning of those* "*terms*. We are, also, clearly of opinion, that proceed- "ings, instituted for the purpose of declaring the forfeit- "ure of a man's property by reason of offenses com- "mitted by him, though they may be civil in form, are, in "their nature, criminal. * * * As, therefore, suits "for penalties and forfeitures incurred by the commission "of offenses against the law, are of this *quasi-criminal* "nature, we think, that they are within the reason of "criminal proceedings for all the purposes of the *fourth* "*amendment* of the Constitution, and of that portion of "*the fifth amendment* which declares, that no person shall "be compelled, in any criminal case, to be a witness "against himself; and we are further of opinion, that a "compulsory production of the private books and papers "of the owner of goods, sought to be forfeited, in such "a case, is compelling him to be a witness against him- "self, within the meaning of *the fifth amendment* to the "Constitution, and is the equivalent of a search and seiz- "ure—and *an unreasonable search and seizure*—within the "meaning of the fourth amendment.

"Though the proceeding in question is divested of "many of the aggravating incidents of *actual* search and "seizure, yet, as before said, it contains their substance "and essence, and effects their substantial purpose. It "may be, that it is the obnoxious thing in its mildest and "least repulsive form; but *illegitimate and unconstitutional* "*practices* get their first footing in that way, namely, by "silent approaches and slight deviations from legal modes "of procedure. This can only be obviated by adhering "to the rule, *that constitutional provisions for the security* "*of person and property should be liberally construed.* A "close and literal construction deprives them of half their "efficacy, and leads to gradual depreciation of the right, "as if it consisted more in sound than in substance. It is "the duty of courts to be watchful for the constitutional "rights of the citizen, and against any *stealthy* encroach-"ments thereon."

The opinion, then, commencing at page 635, reviews various cases, decided in the Circuit and District courts of the United States, which were apparently cited as authority in the argument of the Boyd case, and amongst them, cases decided by the district and circuit judges in the Northern district of Illinois. These opinions are substantially *disapproved*, and may, therefore, be regarded as overruled by the authority of this court.

Mr. Justice MILLER, who gave a separate opinion in the case, says (page 639): "I am of opinion, that this "is a criminal case within the meaning of that clause of "the *Fifth* Amendment of the Constitution of the United "States, which declares that no person 'shall be com-"pelled, in any criminal case, to be a witness against him-"self.'

"And I am quite satisfied, that the effect of the Act of

"Congress is to compel the party on whom the order of "the court is served to be a witness against himself. The "order of the court, under the statute, is, in effect, a "subpœna *duces tecum*, and though the penatly for the "witness' failure to appear in court with the criminating "papers, *is not fine and imprisonment*, it is one, which "may be made more severe, namely, to have the charges "against him of a criminal nature, taken for confessed "and made the foundation of the judgment of the court. "That this is within the protection which the constitution intended *against compelling a person to be a witness* "*against himself*, is, I think, quite clear."

Mr. Justice Miller only dissented from that part of the general opinion of the court, which seemed to hold, that the act of 1874 authorized an *unreasonable search and seizure* of a man's private papers and property within the meaning of the Fourth Amendment of the Constitution.

In all these cases, as well as in all the cases which may be cited against us, the statutes, which were claimed to *supersede and negative* the admitted interpretation of constitutional law, by their very terms, made it *compulsory* upon the witness to give testimony, although it might be incriminating against him, or have a tendency to convict him of a crime. The Massachusetts, New Hampshire and Virginia cases say, in unmistakable language, that such statutes cannot have the effect claimed for them, *unless they broadly and fully furnish complete immunity from prosecution in any form, in respect to the crime* or offense, in relation to which the witness is sought to be examined. All the cases from the state courts, on whichever side of the present controversy they may be presented, hold, that the *constitutional*

provisions, in whatever language they may be couched, furnish full protection to a witness in his refusal to disclose facts by his answers, which would have a tendency to criminate him, and, in the absence of statutes forbidding the use of his testimony in any prosecution against him, *would furnish complete justification for his refusal to answer*. There may be exceptions to this general statement, where the constitutional provision is limited and restricted to the party *accused of a crime*, which is the case of the Constitution of Missouri, both the original constitution of 1820, and the revised constitution of 1865, the language of those constitutions being identical in the respect here important, namely: "That in all criminal "prosecutions, *the accused* has the right to be heard by "himself and his counsel * * *; that *the accused* "cannot be compelled to give evidence against himself, "nor be deprived of life, liberty or property," etc.

Such language in a constitution, relating to the question of *compulsory* incriminating evidence, is not the equivalent of the provision of the constitution of the United States here involved; much less is the silence of some state constitutions upon the same subject, a substitute for such a provision; and in such states, it might be expected, perhaps, that under legislation *compelling* witnesses to testify, although their testimony might tend to incriminate themselves, the decisions of the courts would be narrower, as under such circumstances, legislation would seem to have a larger control and influence.

The sufficient answer to the decisions of state courts, under constitutions similar, in this respect, to the Constitution of the United States, would seem to be *that legislation cannot destroy, take away, or abridge a constitutional right or privilege*. It does not lie in the power of legis-

latures, either state or national, *by their own enactments merely*, to abate one tittle from the protection afforded to a citizen by a constitutional provision. To hold that it could, would be to subordinate the constitution, under and in accordance with which all legislation must be had, to a mere legislative enactment. The proposition is a plain one, and however cases from state courts allow or attempt to substitute *statutory protection for constitutional immunity*, even though they were stronger in their reasonings than the sensational apology of Judge Denio, they cannot make the idea of such substitution intelligently respectable. The Massachusetts, New Hampshire and Virginia cases, therefore, whilst they go far enough to reverse the rulings and the judgment of the Circuit court in this case, still, may be said to fall short of giving to the constitutional provisions, the full measure of their efficiency, when brought into competition with legislative acts; for they all, though in some cases reluctantly, seem to half admit, that a special kind and quality of legislation may suspend and render nugatory, *a plain provision of constitutional law*. A principle of the common law, recognized, established and made permanent by a constitutional provision, must be respected and followed in its integrity by legislatures and by courts, wherever it may lead, until it is changed or modified in a constitutional way. This proposition represents the only idea of *constitutional safety to the rights of the individual citizen*.

VII.

IT MAY WELL BE ARGUED AND INSISTED THAT THE COMMON LAW RULE, "PLACED BEYOND THE REACH OF "ORDINARY LEGISLATION" BY THE CONSTITUTION, IS MORE COMPREHENSIVE THAN HAS THUS FAR BEEN CLAIMED FOR IT, AND THAT IT IS A PROTECTION AGAINST THE COMPULSORY DISCOVERY OF EVIDENCE TENDING TO DISGRACE THE WITNESS OR RENDER HIM INFAMOUS.

There is a distinction, always to be borne in mlnd, between testimony, which merely *disgraces* a witness and evidence, which *impeaches* his character for truth and veracity. For instance, a man may have been guilty of an offense against the law, for which he has been pardoned, or suffered the penalty, or for which, by lapse of time and the operation of limitation laws, he cannot *lawfully* be prosecuted. He may, possibly, stand in the community, by reason of his *subsequent good behavior as a citizen*, as a man of irreproachable character. All the past may have been unknown or may have been forgotten. Is there no anguish, humiliation, disgrace and infamy—penalities and forfeitures, quite as severe socially, and practically as fines and imprisonment, in compelling him to disclose, as a witness, his *antiquated delinquencies* and thus renew before the public, in his personal associations, the disgrace which years of integrity in business and good conduct, have lived down and overcome? The difference between impeaching evidence and such testimony as this would be, must be apparent, and the question arises, did the common law rule, which it was the object of the constitutional provision to save and place beyond

the reach of ordinary legislation, exclude such testimony as is thus referred to?

It is respectfully suggested, that the rule of the common law, protected and made secure by the constitution, was not aimed *merely* at the compelling of evidence of a *criminating* character from the witness, or in other words evidence, which could be made available for the *conviction* of the witness of a crime, but that it had a broader and more humanitarian scope, such as is illustrated by the text of Starkey on Evidence, already referred to, where the author says: "It is pleasant to contrast the humanity and delicacy of the law of England in this respect "with the cruel provisions of the Roman law, which allowed criminals and even witnesses, in some instances, "to be put to the torture for the purpose of extorting a confession." In this connection I am speaking of the law, and that too, constitutional law, as it is or ought to be, and somewhat relying upon the sources from which it was derived.

Testimony extorted, or compelled under the tortures of the rack, and testimony extorted and compelled under penalties and forfeitures and prospects of imprisonment, if refused, range themselves together. In both cases, there is the same inducement to equivocation and perjury, the same moral exposure, degradation and infamy and the same apprehension of punishment, although the punishments may be of different kinds and of different degrees. Confessions secured by promises of immunity, or threats of prosecution, are uniformly discarded by the courts under rules of law as generally administered. Incriminating testimony, if the witness claims his privilege, is absolutely excluded by this rule or practice, if obtained either by a hold-

ing out of hopes or fears. In this we strike *a dead level* in respect to criminating evidence generally. A voluntary confession involves neither hopes nor fears as the result of the confession. It is not material, therefore, whether the testimony, extorted from a witness is convicting evidence against himself, or evidence tending to disgrace him or make him infamous with no other legitimate purpose in view. The maxim of the common law, *nemo tenetur prodere seipsum*, which runs through the opinions of courts, relating to the subject of the pending case, and which it is generally conceded to be the purpose of the constitutional provision under consideration to make secure, has been, and may well be carried farther in its application, than to such disclosures or evidence as may have the effect to convict of crime, and may be held to cover all that class of evidence, which tends merely to disgrace the witness or render him infamous.

There is no doubt, that the earlier rule, and that which prevailed in the English courts about the time when our constitutional amendment was framed, was much more opposed to compelling a man to answer questions, the answers to which might tend to disgrace him or make him infamous, than the rule, which has prevailed in some of our state courts in later years. It is insisted, that it was the earlier rule, in force at the time the constitutional amendment was adopted, which it was the intention of the framers of the amendment to make secure and put beyond the reach of legislation.

In Cook's case, 13 Howell's State Trials, 334, 5 (A. D. 1696), TREBY, C. J., says: "But that you can ask a "juror or a witness every question that will not make "him *criminous*, that is too large; men have been asked, "whether they have been convicted and pardoned for

"felony, or whether they have been whipped for petit "larceny—but they have not been obliged to answer; "for, though their answer in the affirmative will not "make them criminal or subject them to punishment, "yet they are matters of infamy; and if it be an infa- "mous thing, that is enough to preserve a man from be- "ing bound to answer. A pardoned man is not guilty, "his crime is purged; but merely for the reproach of it, "*it shall not be put upon him to answer a question where- "on he will be forced to forswear or disgrace himself.* So "persons have been excused from answering whether "they have been committed to Bridewell as pilferers or "vagrants, or to Newgate for clipping or coining, etc., "yet to be suspected or committed is only a misfortune "and shame, no crime. The like has been observed in "other cases of odious and infamous matters which were "not crimes indictable. But to keep to our case, it is "true, a juror may be challenged, being an alien or being "a villain; but where the matter apparently carries crime "or shame, it should be proved; the outlawry should be "proved, and so should be the being a villain. Yet that "is no crime, though it be an ignominy."

That case was the examination of a juror, but the same rule as to self-incrimination prevailed in that case as in the case of a witness; and what is meant by "proved" in the latter part of this extract, of course, means proving by other witnesses, and not drawn from the juror himself.

In Friend's case, 13 Howell's State Trials (page 17), TREBY, C. J., says: "No man is bound to answer any "questions that will subject him to a penalty or to in- "famy."

In *Parkhurst* v. *Howton*, 2 Swanston (page 216), decided in 1819, Lord ELDON said: "A party cannot be

"called on to criminate himself. It used to be said that "a witness *could not be called on to discredit himself*, "but there seems something like a departure from that. "I mean that in modern times, the courts have permitted "questions to show, from transactions not in issue, that the "witness is of impeached character, and therefore not so "credible. *I remember the time when that would not have "been done.*"

Lord Eldon's professional memory went back to about the year 1789.

In Peake's Law of Evidence, chapter 3, section 2, page 87 (published in 1801), he says: "and this was "formerly the only mode by which the objection could "be raised, for it was then considered as a rule that no "man could be examined to prove his own infamy; but "by the modern decisions on this subject, though a man "cannot be asked any question tending to convict him of "a crime, and thereby be put in danger from his own ex- "amination, yet he may be asked whether he is already "convicted and has suffered the judgment of the law: "for his answer to these questions can put him in no "further peril."

In the case of O'Coigly *et al.*, 26 Howell's State Trials 1,351–1,353), (tried in 1798) a witness was asked upon cross-examination how many informations he had laid in Ireland, the object being to discredit him as being a common informer.

There was nothing criminal in being a common informer, but the following took place:

"Mr. Justice BULLER: It is meant, I understand it "now, to throw an imputation upon him; then he is en- "titled to the protection of the court.

"Mr. GURNEY: If I asked him a question which "would convict him of a crime, then, my lord, he would "be entitled to the protection of the court.

"Mr. Justice BULLER: We are all of opinion as it "stands now, that the question ought not to be put."

In the case of *Rex* v. *Hodgson, Russell & Ryan*, 211 (reported in 1812), the judge disallowed a question on the ground that it tended to criminate and disgrace the witness, thus importing that he considered the word "criminate" to include the word "disgrace."

In the case of *Respublica* v. *Gibbs*, 3 Yeates (Penn.), 437, the court, by Chief Justice SHIPPEN, says: "The "maxim is *nemo tenetur seipsum accusare (seu prodere)*. "It is grounded on the best policy and runs throughout "our whole system of jurisprudence. It is the uniform "practice of courts of justice as to witnesses and jurors. "It is considered cruel and unjust to propose questions "which may tend to criminate the party. * * * The "words '*accusare*' or '*prodere*' are general terms, and "their sense is not confined to cases where the answers "to the questions proposed would induce to the punish- "ment of the party; if *they would involve him in shame "or reproach, he is under no obligation to answer them.*"

The case of *Lessee of Galbreath et al.* v. *Eichelberger*, 3 Yeates, 517 (decided in 1803), expressly approves the interpretation of the maxim given in the preceding case. The court says, referring to the case of *Respublica* v. *Gibbs*: "The rules of evidence are founded in reason and good "sense. To oblige the witness to be sworn under the "circumstances of this case, would be in effect compell- "ing him to accuse himself of an *immoral act* and in vio- "lation of his privileges as a citizen."

These rulings of the courts of Pennsylvania were under the provision of the constitution of that state already referred to, which says that "the accused" cannot be compelled to give evidence against himself in a criminal prosecution. The person who was under examination in the last case, was a witness merely.

In Traynor's Latin Maxims and Phrases, 3d Edition, page 375, the author says: "A witness formerly might "be asked but was entitled to decline answering, any "question which involved even his shame or moral deg- "redation, for it was thought that to compel witnesses to "speak to their own shame was likely to result in very "frequent acts of perjury."

In the *People* v. *Herrick*, 13 Johnson, 82 (decided in 1816), the head-note says: "A witness either on the "*voir dire* or on cross-examination is not bound to answer "any question which would subject him to punishment or "render him infamous or disgraced."

These citations seem to be sufficient to establish the proposition, that under the rule of the common law prevailing at the time the fifth amendment to our constitution was adopted, witnesses could not only, not be compelled to answer questions, the answers to which would have a tendency to criminate them, or to convict them of a crime, but also were privileged to decline to answer questions, the answers to which might tend to disgrace them or render them infamous. It may be well said, that the humane purpose of these provisions of the English law, adopted into our constitution, was, in part at least, to avoid the strong temptations to equivocation and perjury, which would be presented to a witness or a party to a cause, if compelled to answer questions which would

either criminate or disgrace him; and it is, therefore, insisted, that the proper construction of the constitutional provision here involved, is broader in its scope and application than some of the decisions of our state courts have given to the provisions of their constitutions substantially of the same character.

VIII.

IT IS WELL SETTLED LAW, THAT IF A WITNESS VOLUNTARILY, OR OF HIS OWN MOTION, TESTIFIES TO ANY MATTER WHICH MAY TEND TO EXPOSE HIM TO CRIMINAL PROSECUTION, HE IS BOUND TO GIVE ALL THE DETAILS OF THE TRANSACTION, IF REQUIRED.

State v. *Ober*, 52 N. H., 459.
Commonwealth v. *Morgan*, 107 Mass., 199, 205.
McGarry v. *People*, 2 Lansing, 227, 232.
Connors v. *People*, 50 N. Y., 240, 242.
Roddy v. *Finnegan*, 43 Md., 490, 502.
Norfolk v. *Gaylord*, 28 Conn., 309.
1st Greenleaf's Ev., §§ 251, 251 a.

Why is this? Why say, that if a witness voluntarily begins to give evidence tending to criminate himself, he is bound to give all the details of the transaction if required so to do, *if he can be compelled under the law to begin?* If the theory of *compulsion* is the correct one, his mouth is wide open in respect to incriminating matters at all times, and under all conditions, and he has no right to close it, either in the beginning, or at any other stage of his examination. What then would be the propriety of saying, that, *if he opens his mouth*, he is bound to keep it open to the end? The two positions

are inconsistent, and this very inconsistency is a strong, if not a conclusive argument against all theories of compulsion, when the witness insists upon being silent and seasonably claims the benefit and protection of his constitutional privilege.

IX.

THE ACT OF CONGRESS OF FEBRUARY 25, 1868, ENTITLED "AN ACT FOR THE PROTECTION, IN CERTAIN CASES, OF "PERSONS MAKING DISCLOSURES AS PARTIES OR TESTI-"FYING AS WITNESSES" NOW A PART OF THE UNITED STATES REVISED STATUTES AS SEC. 860, DOES NOT ATTEMPT TO REACH, MODIFY, OR AFFECT IN ANY WAY, THE CONSTITUTIONAL PROVISION EMBRACED IN THE FIFTH AMENDMENT. IT COULD NOT HAVE AFFECTED THE CONSTITUTIONAL PROVISION, EVEN IF IT HAD ATTEMPTED SO DO TO. THE IDEA OF COMPULSORY INCRIMINATING TESTIMONY IS NOT EXPRESSED IN THE ACT.

This proposition has already been somewhat discussed. A fuller analysis and discussion of the statue of 1868 will be left to my learned associate; but my estimate of this case, in view of what has been said in the progress of it through the lower courts, and stated in the opinions of those courts, would not be given effect to without again calling attention to the provisions of that statute. Before doing this, however, *and without attempting to anticipate the line of argument*, which may be adopted by the Attorney General and his associates in behalf of the appellee, I wish to refer to the case of *U. S.* v. *McCarty*, reported in 18th Fed. Rep., 87, and 21 Blatchford, 469. The opinion in that case seems to have been by judge Brown of the United States District court for the Southern

district of New York, in which he says: "The statute "above quoted (Sec. 860) in preventing all possible use "of testimony thus given, does away with the reason of the "rule, and there is therefore no longer any ground for "its application. The maxim, *cessat ratio, cessat lex*, "would seem to apply in full force."

This is the substance of all the reasoning (I beg the pardon of the court—it is not reasoning but assumption merely), which undertakes to subordinate a constitutional provision to an interpretation of a legislative act. It is difficult to understand what the learned judge meant by the word "*rule*" in such a connection. Did he forget, that what he designates as a "*rule*" was a provision of constitutional law, beyond the reach of ordinary legislation? If the rule, of which he was speaking, was simply a rule of the common or statute law, with no guaranties surrounding it and making it immutable, it would be admitted that such a rule might be changed or abrogated by legislation merely. If, however, he had in mind, as he must or ought to have had, the rule of the common law, *made secure and permanent by constitutional provision and adoption*, both he and his opinion are open to the charge of *judicial prejudice*, or perhaps only the lighter charge of *judicial weakness*. I am inclined to believe that the lighter charge is the more appropriate, for further on in the opinion, the case of the *People ex rel.* v. *Kelly*, 24 N. Y., is referred to, and the comment is, "It is unnecessary "to add anything to this exposition of the law."

There is one sense in which this last quotation from the opinion of the learned judge may be adopted by everybody, and in that sense I adopt it, namely: Nothing can be added to the opinion in that case as to its absolute disregard of constitutional rights, and to the want of com-

prehension of the importance of preserving, in their integrity, constitutional provisions. Constitutions are demolished by such careless judgments of courts, no matter what their honesty of intention may be.

I am speaking for myself merely, when I say, that it is impossible to conceive of a judicial judgment, which, considering the title of the act of 1868, and the language of its provisions, will say, that a legislative act annuls or makes inoperative the provisions of the fifth amendment. In what school of philosophy could such a conclusion have been reached? It is better to discard schools of philosophy as well as all reasoning, and fall back upon the truthful confession, that, *sometimes*, judges and courts *superficially examine and superficially decide.* Why they do so, may not be inquired into.

Section 860 of the Revised Statutes of the United States, *does not pretend to authorize the compelling of criminating evidence from a party or witness. The idea of compulsion is not contained, by implication even, in any word or phrase which it contains.* In this respect it differs essentially from all the state statutes, under which state decisions have been rendered, and in reference to which the opinions of state courts (if they have reference to anything) must have been written. The evident purpose of the section was and is in harmony with a *liberal* construction of the constitutional provision, and with no purpose of superseding it. It is not the equivalent of the constitutional provision liberally interpreted and applied as it should be; nor can it stand in its place. It rather belongs to that class of remedial laws in aid and not in derogation of constitutional provisions, which attempts to extend the benefit and protection of constitutional provisions to those, who, from ignorance or inadvertence,

have neglected to claim their privileges. Disclosures *voluntarily* made and testimony *voluntarily* given are all that the section itself deals with when fairly interpreted and applied. It does not even suggest the idea, that a party or witness, under any conditions or circumstances, can be or may be compelled, against his objections, and under penalties or forfeitures, to disclose facts tending to criminate himself, or to subject him to disgrace or render him infamous. *The court cannot add the compulsory clause or take away or abridge the constitutional immunity.*

The fifth amendment, in its objects and purposes, is in line with that clause of section 10 of article 1 of the constitution as originally adopted which says, that "No state " * * * shall pass any bill of attainder, *ex post facto* "law, or any law impairing the obligation of contracts." Both were designed for the protection of the rights and liberties and general welfare of the citizen or subject. In speaking of that provision of the latter, which relates to the passage of *ex post facto* laws, Mr. Madison, in No. 44 of the Federalist, says: "So solicitous were the "framers of the Constitution to prohibit such laws that "they imposed upon every state government the same "restriction. * * * *Our own experience has taught us*, "nevertheless, that additional fences against these dan- "gers ought not to be omitted. Very properly, there- "fore, have the convention added this constitutional bul- "wark in favor of personal security and private rights."

In No. 789 of the Federalist, Mr. Hamilton, speaking on the same subject, says: "By a limited Constitution, I "understand, one which contains certain specified excep- "tions to the legislative authority, such, for instance, as "that it shall pass no bills of attainder, no *ex post facto* "laws, and the like. Limitations of this kind can be pre-

"served in no other way *than through the medium of the* "*courts*, whose duty it must be to declare all acts con- "trary to the tenor of the Constitution, *void*. Without "this, all the reservations of particular rights and privi- "leges would amount to nothing."

These papers were written by men who had the opportunity to know, and the ability to understand and appreciate the necessity for the insertion of these provisions in favor of personal rights and privileges into the constitution, and to give to them, in view of the actual facts, a careful and discriminating application. They are contemporaneous interpretations by the ablest men of the period. How would it do to draw a comparison between them and the "*sockless*" representative and "Alliance" judge from the State of Kansas? The court may make the comparison.

Ages of consolidated wisdom are, sometimes, wiped out by a pen, *which is wielded by power*. Grave questions of personal rights must ultimately be submitted somewhere and somehow. Passion, prejudice and weakness, although accompanied with an honest purpose, are as fruitful of disaster in public affairs *as premeditated villainy*. The framers of our constitution and the amendments thereto, did their part of the work with a just sense of its importance. It is doubtful if it was possible for them to foresee the disturbances in social, political and business life, which the closing years of the nineteenth century have developed. Whether they did or did not, they trusted the protection of the theories of the Government which they estalished, to the intelligence and integrity of the courts of the country.

X.

A practice in legislation has grown up within the past twenty years and seems to be spreading like a contagious disease, which is rapidly reducing the business community to a community of affidavit makers in respect to much which was formerly thought to be *private* affairs. Its tendency is to multiply the occasions for oaths and affirmations and diminish the veneration in which they should be held by placing them upon the basis of a common business necessity. In his dealings with the public, or with large numbers of the people, no man seems to be trusted unless he has backed up his integrity by swearing to his statement. With this tendency of legislation probably the courts have nothing to do, until it reaches a point at which constitutional limitations may be interposed as a positive prevention. That point, it is insisted, has been reached in the present case.

The position, in which Mr. Counselman finds himself in the conduct of his *private* business, is both unpleasant and embarrassing. He is a commission merchant and a dealer in grain. He purchases his grain *where he may find it, for sale*, and is at liberty under the law, so far promulgated in respect to his business, to purchase it on the best terms he can. He purchases in the country *for a market*. Transportation *to a market* is necessary in order to make his purchase available. Different lines of transportation are open to him. Assume that his transactions are large, and that he has 100,000 bushels of grain at a point in Iowa or Nebraska, where two or more lines of railroad meet, each furnishing transportation for grain to Chicago, which *for illustration*, may be his objective point, *as a market*. All of these lines of transportations are equally

open to him. You may add to this, if you please (not an unusual occurrence), that he has paid for his grain, the highest available price, and that the market has declined, and now, you say, or rather the interstate commerce law says *he shall not and cannot*, by negotiation with the several lines of transportation available to take his grain to market, secure a reduced rate of transportation which will, in part, or in whole, save him from loss, (or perchance, secure a profit) *without exposing himself to fines, penalties, forfeitures and imprisonment*, and the court is asked to interpret the law in such a way as to compel him to be his own accuser, and furnish, *in fact, the evidence or the means of procuring the evidence*, which will convict him of an *infamous crime*, growing out of a *simple matter of private business, made necessary for his own protection.* Is that the *humanity of the English common law, commended by Starkie*, in contrast with the *cruelties and inhumanity* of the Continental or Roman law? Is it a vindication of the specific doctrine announced by this court in *Pumpelly* v. *Green Bay Company*, 13 Wall., 117, where, in respect to another clause of the same fifth amendment, and protected by the same guaranties, and no others, all being in behalf of personal rights and liberties, the court says, it was "*always understood to have* "*been adopted for protection and security to the rights of* "*the individual against the government, and which has* "*received the commendation of jurists, statesmen and com-* "*mentators*, AS PLACING THE JUST PRINCIPLES *of the com-* "*mon law on that subject beyond the power of ordinary* "*legislation to change or control them*"?

The answer to these inquiries is for the court. On behalf of Mr. Counselman, it is insisted that the orders

of the District court and the rulings and judgment of the Circuit court are in violation of his *constitutional* rights and privileges, as this court has defined them in analogous cases, and that the judgment of the Circuit court, for this reason, must be reversed.

JNO. N. JEWETT,
Atty. for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM 1891.

CHARLES COUNSELMAN,

Appellant;

vs.

FRANK HITCHCOCK, MARSHAL, ETC.,

Appellee.

BRIEF FOR APPELLANT.

JAMES C. CARTER,
Of Counsel for Appellant.

Albert B. King, Printer, 89 William St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891.

CHARLES COUNSELMAN,
Appellant,

vs.

FRANK HITCHCOCK *et al.*

The statement and assignment of errors prefixed to the brief of Mr. Jewitt is referred to and adopted.

First Point.—The grand jury had no jurisdiction in the proceeding in which the appellant was required to testify; and consequently its requirement that he should testify and the orders of the Court based thereon were *coram non judice* and void.

1. All that the record informs us of concerning the character of this proceeding appears from its report, in the following words: "that it

"was engaged in investigating and inquiring "into certain alleged violations of an act of "Congress (the Inter-State Commerce Act) "by the officers and agents of the Chicago, "Rock Island and Pacific Railway Company, "and by the officers and agents of the "Chicago, St. Paul and Kansas City Rail-"way Company, and by the officers and "agents of the Chicago, Burlington and "Quincy Railroad Company, and the "officers and agents of various other rail-"road companies having lines of road in said "district and division." It was not the case of a charge, or charges, against any particular person, or persons. It appears therefore that the Grand Jury were assuming to proceed without any charge of the commission of any offence, and without any knowledge which had come to any of their number that any offence had been committed (for had there been such knowledge, it must necessarily have implicated some one) to inquire whether any of the persons referred to, and who composed a class so large that any offence against the law in the district for which the jury was impanelled must necessarily have implicated some one of them, had committed an offence.

The Grand Jury was therefore engaged in an *inquisitorial investigation to ascertain whether* any *violation of the law had been committed*, and without any reason to suppose that any had been committed, beyond mere rumor or suspicion.

2. No such power can be exercised by a grand jury. That body is but a constituent element of the criminal Court, which has itself no *inquisitorial authority*, and cannot, therefore, exercise any by any instrumentality.

a. Our system of law does not contemplate any inquiry into the commission of crime, except for the punishment of it, and where the Court is, at the start, *credibly informed* that a crime has been committed. It is so informed, when the Court by its prosecuting officer, or through some other authentic agency, is *apprised of some facts*, leading to the belief that some person has violated a penal law; or when some member of the grand jury is apprised of such facts and communicates his knowledge to his fellows. A foundation is then laid for an investigation with the view of ascertaining whether there is sufficient credible evidence to justify a formal accusation which the party implicated may be called upon to answer.

It is possible, at all times, that violations of criminal law may have been committed; but if they are shrouded in such secrecy that no citizen can, or will, communicate any information of them to officers or bodies charged with the duty of prosecution, they must go unpunished. The mere possibility that crimes have been committed is no justification to any magistrate or body to issue *subpœnas* and examine witnesses.

If it could be done in any case, it could be

done in all cases, and mischief without limit might ensue. What can be more foreign to our system of criminal administration than that citizens should be summoned before a magistrate or other body, where no proceeding has been instituted to which there are parties, and the secrets of their bosoms torn open, merely for the purpose of ascertaining whether some crime has not been committed which no one has any valid ground even for suspecting?

b. No man can be restrained of his liberty without *due process of law*, and, surely such a subpœna does not, nor would any order based upon it, answer that definition.

c. That crimes should sometimes go unpunished is not the worst thing which may happen to a people. Many necessarily must and do go unpunished; but this does not imperil the State. If all of which information reaches the public, and thus, in the ordinary course of things, the prosecuting officers, are punished, the purposes of criminal justice will be amply satisfied. If there are some (and there may be many) which injure no one to such an degree as to induce complaint, and no knowledge of which comes to any members of the body politic save those implicated in them, no very great harm can come to the State from leaving them in the secrecy in which they

are enveloped; certainly, no harm at all comparable to that which would be done by subjecting every citizen to the obligation to answer the summons of a purely inquisitorial tribunal to appear before it and answer all questions which may be put to him. What remedy could there be against the attacks of malice or envy, or even of mischievous curiosity, if such practices should be allowed?

d. Against the dangers thus suggested there is no protection except in those rules which deny the existence under our government of any merely *inquisitorial power* to hunt for crimes; and which declare that a grand jury is but a facility to aid the criminal Court in the discharge of its duties, and has no jurisdiction where the Court itself has none. In the language of Chief Justice Marshall (U. S. *vs.* Neill, 1 Brock C. C. 159): "To suppose the powers of a "Grand Jury, not by express statute, but "by the necessity of their aiding the juris-"diction of a Court, to transcend that "jurisdiction would be to consider grand "juries, once convened, to be clothed with "powers not conferred by law, but origin-"ating with themselves. This has never "been imagined."

e. It is respectfully submitted that grand juries have no powers except those embraced in the usual charge of the Court to

them, and these are to inquire concerning those violations of law which are *given them in charge*, or which *come to the knowledge of some of their members*. The knowledge which has not *so come* cannot be sought by *bringing other persons before them, at their pleasure.*

Mr. Justice Field's charge ; 2 Sawyer, 667.

Appeal of Hartranft *vs.* Commonwealth, 85 Penn. St., 433.

People *vs.* Rilley, 25 N. Y., 74.

5 Penn. Law Journal ; 63, 64.

4 Bl. Com., 301 *et seq.*

Case of Lloyd *vs.* Carpenter, 3 Penn. Law Journal, 188.

Grand Jury *vs.* Public Press, 4 Brews., 313.

1 Whart. Crim. Law, 452–460.

f. There are certain exceptional instances of occurrences of notoriety, such as public riots, &c., which may give a criminal *Court* jurisdiction to make an inquiry without a *charge* against some person or persons ; and so enable a Court to give such matters in charge to a jury. But it is insisted that in *ordinary* cases no *Court* has any jurisdiction to make an investigation concerning crimes except upon something in the nature of a *charge* being laid before it, or some *facts* enabling the Court to see that there is a *case*, to which the government is a party on the one side, and some particular person or persons on the other. It is im-

possible to indulge a larger practice without asserting for criminal Courts a general inquisitorial power, which, from the nature of the case, can have no limits.

Second Point.—The prohibition contained in the Fifth Amendment: "No person shall be "compelled in any criminal case to be a wit- "ness against himself" was intended to secure for all time one of the principal fruits of a long prior struggle between the opposing forces of the spirit of *individual liberty* on the one hand, and the *collective power of the State* on the other; and, as such, should be construed as embracing the whole object contended for in the struggle. When thus interpreted its scope is co-extensive with the common law rule which exempts the citizen from the obligation to disclose before any tribunal any matter having a tendency to criminate him. A *criminal case* must be understood to mean a *case relating to a criminal matter*. And to be a witness "*against himself*" must be understood to mean the giving of evidence in any proceeding which incriminates the party giving it.

1. What we understand by *liberty* is the exemption of the *individual* from restraint proceeding from the *State*. It matters not in what particular form this restraining power may be exercised, whether by an individual *despot*,

by an *aristocracy*, or, under democratic forms, by a *majority*. The restraint in either case is equally destructive to liberty.

2. Even under unlimited monarchies, a large practical indulgence may be allowed by habit and tradition to individual liberty, and a high degree of civilization be, in consequence, attained; but, in such cases, the precious possession is always in peril at the moment when most needed. The one distinguishing difference between the liberty and civilization of the race from which we are descended and others lies in the fact that the former has always demanded, and successively secured, *permanent safeguards* and *guaranties* for its freedom.

3. The original framers of the Constitution failed to appreciate fully the jealousy for individual liberty so deeply implanted in the minds of the people of the colonies. The latter instinctively felt that they might be robbed of the possessions, which had been so dearly purchased, by a *majority* clothed with the legislative power as easily as their ancestors had been by despotic authority; and the first series of amendments to the Constitution were demanded by the people in order that the most perfect safeguards might be secured.

4. The freedom of thought, of speech and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the Constitution, and the contests were fresh in the memories and traditions of the people of that time.

Boyd *vs.* The United States, 116 U. S., 626.

5. A brief sketch of the history of this struggle will exhibit the following principal features:

a. The practice of compelling accused parties to criminate themselves by examinations under oath was never in accordance with the temper or spirit of purely English institutions; though at an early period there seems to have been no absolute legal condemnation of it. It was, however, an essential feature of both the civil and canonical systems of law to subject parties to any judicial proceeding to the obligation to give testimony upon oath, and no distinction

in this respect was made between civil and criminal cases.

b. The general hostility which Englishmen exhibited towards the encroachments of the civil and canon laws naturally induced a hostility towards the *practices* which were incidental to those systems; and it is probable that the first distinct and marked opposition to the practice of compelling self-incrimination, grew out of the general antipathy to the jurisdictions which sanctioned that procedure, as well as from a conviction of the mischiefs which the practice brought about. The unpopular *practice* was made use of in order to create an adverse opinion against the jurisdictions.

c. But, in the course of time, the ecclesiastics, when they happened to find a sovereign favorable to their pretences, began to push their authority in the direction of discovering and punishing spiritual offences, especially that of heresy. Boniface and Cardinal Otho, who came over to England about the time when Henry III married his French wife, A. D. 1236, the former being her uncle, and afterwards made Archbishop of Canterbury, were conspicuous in these undertakings; and the latter promulgated a canon which authorized the administration of an oath commonly called the oath "*ex officio.*" The language of the canon was: "Laymen shall be compelled by

" excommunication, if need be, to take an " oath to speak the truth, when inquiry " shall be made by the prelates and Judges " ecclesiastical, for the correction of sins " and excesses " (3 Burns Ec. Law., 14).

d. These growing pretences challenged opposition ; and it now became specially directed, not so much against the ecclesiastical jurisdictions, as against the particular practice of compelling a party to criminate himself.

An early statute of uncertain date " *Prohibitio formata de statuto articulorum cleri*," probably in the time of Edward II, restricted the administration of self-incriminating oaths to testamentary and matrimonial causes, in which, it would seem, they had been allowed from a period long before. This statute may be said to be one of the original foundations upon which the rule protecting witnesses from self-accusation was erected.

e. The clergy, however, at length obtained from a pliant sovereign, Henry IV, in 1406, a statute under which they held themselves at liberty to again make use of the prohibited oath. And this relaxation was, in turn, done away with by a statute of the 25 of Hen. VIII (1533).

f. The institution of the odious jurisdictions

of the Star Chamber and the High Commission, both of them adopting arbitrary methods, self accusing oaths among others, seems to have brought about a renewal of the practice, notwithstanding the statute of 25 Hen. VIII.

The high hand with which these tribunals carried their proceedings, and especially the cruel extortion of admissions of guilt from the breasts of its victims, greatly excited the English people and added intensity to the opposition to self-incriminating methods of procedure.

The popular anger seems to have culminated in the case of the proceeding against John Lilburne, who was accused before the Star Chamber in 1637 of printing and publishing seditious books. He refused to take the oath *ex officio*, and was sent to prison. Four days later he was again brought up, and, still refusing, was fined and *whipped* through the streets to the pillory. He seems to have been somewhat of a *crank*—a class of persons who, from their persistency and courage, have in times past rendered the greatest service to British freedom at critical moments—and, when in the pillory, he reviled the bishops and scattered copies of his pamphlet, and was thereupon *gagged*. His reason for refusing the oath indicates the sentiment of the times. He declared that, "by law no free-born Englishman could be made to accuse himself," from which he was ever after called "Free-born John." He remained in prison until

1640. But he greatly contributed to bring the Court of Star Chamber to ruin. His Judges were impeached, and the record of the proceedings against him was expunged; and by the Act of 17 Car. I., cap. 10, the Court was absolutely abolished.

The Star Chamber, by Burn, pp. 19–149.

g. Just before the actual abolition of this odious tribunal, an end was sought to be put to its practice of compelling self-incrimination by the Stat. of 16 Car. I., c. 2 (1641), and this not proving entirely effectual, a further act (13 Car. II., c. 12, 1662) was passed, which left no pretence for its further continuance.

h. A learned article on the maxim of "*nemo tenetur seipsum prodere*," in the *Harvard Law Review* (Vol. 5, p. 45) has been resorted to in framing the above sketch. It may be usefully consulted, but some of its conclusions seem to me not warranted.

6. Attempts have been made to show that there was nothing more substantial in this struggle than the antipathy of English lawyers against the civil and canonical procedure, and to question the value of the rule which exempts the citizen from the obligation to give evidence tending to criminate himself.

(See Article above referred to, and Bentham's Rationale of Judicial Evidence, Bentham's Works, Edin., 1843, Vol. VII., p. 458, *et seq*). But to impute so long and earnest a struggle to the jealousy of a small professional class is shallow and superficial. It is more reasonable to explain the British antipathy to the civil and canonical systems of procedure by referring to the fact that these systems had been framed under despotic governments and were deeply imbued with the spirit and methods of absolute power. The legal profession but voiced the deep public prejudice against them. Nor is it easy to believe that the people of the American colonies would have insisted upon the incorporation into their fundamental law of the mere prejudice of a small professional body of men.

7. It is not a very becoming office in an American Court to *weigh the value* of a maxim which has been crystalized in the constitution; but this particular rule would find an easy vindication in the precepts of the philosophy of liberty.

a. The proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom. The

limit which the law carefully assigns to the power to make searches and seizures proceeds from the same source.

b. Free society contemplates that there are other public and social objects which should not be sacrificed in the effort to procure the punishment, in every instance, of crime. The prohibition itself which we are considering, and the familiar adage, that it is better that ten guilty men should go unpunished than one innocent man should suffer, are proofs that, in the view of our law, too high a price may be paid for the uniform enforcement of the criminal law.

c. The essential cruelty of compelling a man to betray his own guilt needs no illustration. If the public interest *absolutely demands* that the disclosure should be made (and such must be the argument of those who assert the rightfulness of compulsion in such cases), it should be enforced by whatever means will accomplish the object. Imprisonment is only a less cruel resort than *torture*. The very circumstance that a lofty spirit will accept imprisonment, and even torture, in preference to revealing some secrets of the breast is a sufficient proof of the extremity of the cruelty which enforced disclosure involves.

d. The *untrustworthiness*, in general, of such

testimony is also a main consideration. Truth can be thus extorted only from the finest spirits; and in their case the compulsion is real torture. In a great number of instances falsity is the ready product, and scarcely costs the victim a pang. What can better indicate the low estimate placed by the law upon such evidence, than the rule, vindicated by long experience, that confessions made under the promise, or even the expectation of favor, if they have been encouraged by a holding out, are to be condemned as involuntary and rejected when offered as evidence?

1 Phil. on Evi. (Edwards' Ed., 544).

e. Nay, such compulsory evidence is often worse than nothing. The victim will sometimes accuse the innocent rather than betray himself.

f. And what can be better calculated to break down the sanctity of an oath than the frequent exhibition of perjury, sure to occur, and as sure to be justified, or excused, in men's minds, when perjury is made necessary to safety? Even now a man is sometimes compelled to testify as to whether he has had illicit intercourse with some woman of virtuous repute. Which would be the greater disgrace in the eye of the world, perjury, or the betrayal of the woman? Is it worth while, for the sake of the possibility, so slender and doubtful, of gaining a

benefit, to incur mischiefs so grave and sure? The common law rule and the constitutional prohibition are the fruit of a negative answer to this question.

8. Any attempt to place a narrower interpretation upon the prohibition under notice would lead to a very irrational result. If we should say that "a criminal *case*" can have no broader signification than a public prosecution instituted against some particular person or persons on a criminal charge, we should, in consistency, be obliged in construing the words "be a witness against himself" to adhere to a like rigid construction, and confine them to the meaning of compelling a man to testify to self-incriminating matter in a prosecution instituted *against himself*. But no one could have felt that a safeguard was especially needed against a rather imaginary mischief. Such a thing as to call a man as a *witness* in a criminal prosecution directed *against himself* has never been dreamed of in the English common law. The mere circumstance that he was a party to the record would have been enough to prevent this, even if there had been no graver objection founded upon principle and tradition. And the dangers of an erection in this country of such arbitrary tribunals as the Star Chamber and the High Commission could hardly have been anticipated.

The only mischief which could have been seriously apprehended was the practice, often

attempted, and which the common law rule condemned, of requiring a man to testify in criminal prosecutions against *others*, or in civil cases against himself, or others, to matter which might *afterwards be used* to sustain a prosecution against himself. We cannot avoid the conclusion that this was a main part of the mischief against which protection was designed.

9. The general rules of statutory construction certainly enjoin the interpretation above suggested, and the best authorities confirm it.

Hackley's Case, 24 N. Y., 74.

Bradley, J., in United States *vs.* Collins, 1 Woods, 511.

Boyd *vs.* The United States, 116 U. S., 616.

10. In short, the constitutional prohibition is is based upon *a permanent quality of human nature;* and upon a universal antipathy to enforced self accusation springing out of that quality. It proceeds, upon a recognition of the fact, that the consequence of refusing to testify where the law requires it involves, not indeed direct torture upon the rack, but, the next thing to it, *perpetual imprisonment;* that *proud* men will endure even this punishment rather than cover themselves with shame; that *timid* men will run the hazard of it rather than confess themselves guilty of crimes

which will involve a worse punishment, and disgrace coupled with it; and that *bad* men will commit perjury in order to escape it.

The rule is based upon the sound philosophy which declares that it is better that the State should content itself with such means for the conviction of crime as it possesses outside of a resort to such a practice, even if, in some few cases, crime must be allowed to go unpunished.

11. The authorities fully sanction the foregoing view of the foundation of the maxim incorporated into the constitutional provision.

Starkie, in his work on evidence, says (10th Am. Ed., pp. 40, 41), that the rule is based upon two grounds, one of policy and one of humanity; "of policy, because it would "place a witness under a strong temptation "to commit perjury; and of humanity, be- "cause it would be to extort a confession by "duress, every species and degree of which "the law abhors."

Mr. Justice Bradley, in U. S. *vs.* Collins, 1 Woods, 511, says that the immunity is founded upon principles of public policy, and a just regard to the liberties of every citizen.

Chancellor Walworth, in Perrine *vs.* Stephens (7 Paige, 598, 601), says, referring to a statute compelling the disclosure of a taking of usury, and which, at the same time, forbade the disclosure from being used against him, said: "I may be permitted to doubt "whether it is strictly consistent with the

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"spirit of our institutions and of an enlight-
"ened legislation to tempt the conscience of
"any man so far as to compel him to make a
"disclosure of an usurious bargain by his
"answer on oath." He referred to no other reason than the loss of both principal and interest thereby entailed.

And Mr. Justice Bronson, speaking of the same statute, says: "The morality of this "statute is very questionable and it ought "not to be extended by construction" (Bank of Salina *vs.* Henry, 1 Hill, 555, 557).

And Lord Coke says, referring to the oath *ex officio*: "And for this cause, in these "cases, and such like, the ecclesiastical "Judge ought not to examine *partem ream* "upon that oath, for, as a civilian has said, "that is *inventio diaboli ad destruendas* "*miserorum animas ad infernum*" (12 Co. Rep).

12. And the rule that the constitutional guaranty should be broadly and liberally interpreted in order to secure its *whole object* will not be questioned.

a. In Boyd *vs.* The U.S., *ubi supra*, this Court did not hesitate to regard a revenue suit to enforce a forfeiture as a "criminal case," and as being against the claimant, although the proceeding was *in rem*.

13. The history of the framing and adoption of the prohibition also sustains the same interpretation, if indeed it does not preclude any different one. The form of the prohibition as originally recommended to the first Congress by a committee was, "No person shall "be compelled to be a witness against him-"self." In this form it completely embraced the whole common law rule; but it went further; further even than the committee could have intended; for it precluded the compelling of non-incriminating answers to bills of discovery in civil cases. It was manifestly for the purpose only of correcting this error, and not of otherwise limiting the prohibition recommended, that a member moved to qualify by inserting the words "in any criminal case" which was agreed to without discussion.

Annals of Congress, Vol. 1, p. 753.

Third Point.—If the view above taken that the words, "in a criminal case" in the constitutional prohibition are to be understood as meaning "in relation to a criminal matter" and that a man is made "a witness against himself" whenever he is compelled to give self-incriminating evidence, whether in a proceeding against himself, or against others, it needs no further argument to show that the action of the Courts below in requiring the petitioner to answer the questions to which he objected was in direct violation of the constitu-

tional prohibition, and therefore illegal. If he was guilty, these questions compelled him to directly confess his guilt.

Fourth Point.—But if the constitutional prohibition were wholly inapplicable to the case of the petitioner the common law rule "*Nemo tenetur seipsum prodere*" should have been allowed as a full justification of his refusal to answer the questions propounded to him.

1. This rule is available in all cases, civil or criminal, and whether the proceeding be against the witness claiming his privilege or against others. Its purpose and direct effect are apparent from the form in which it is expressed. It is not said that no evidence which a witness may have been required to give, shall, if self-incriminating, be *used* against him; but that he shall not be required to *give* evidence which, *if* used against him, would criminate him.

2. The complete protection which the law aims to extend in such cases is manifest from the suplementary rule of evidence which arose from the possibility of a violation of the original one.

If a man had, perchance, been compelled to

give evidence incriminating himself in a civil suit, or in a criminal suit against others, or brought on account of other offences, and it were subsequently offered to sustain a prosecution against him, it would, upon objection, be rejected. *Voluntary* admissions are competent evidence, but not *involuntary* ones.

Fifth Point.—The decision of the learned Judges in the Courts below did not proceed upon any denial of the main propositions embraced under the above Second, Third and Fourth points; but was based upon the ground that the provisions of Section 830 of the U. S. R. S. made it impossible that the testimony of the appellant should ever be *used* to criminate him, and, therefore, that he would not be made a witness *against himself* by being compelled to testify. It is respectfully submitted that no statute *which leaves the crime existing* can have such an effect.

1. Plainly no such attempt to avoid the prohibition against compulsory testimony could be made where the proceeding was really one directed against the person required to testify. If, on the trial of an indictment, the defendant himself were interrogated in respect to his guilt, his testimony would be communicated to the jury, and necessarily have

its effect on their minds. It would of necessity be *used against him*, and the case would be the same in proceedings before a grand jury. The rule protects a man against *indictment*, as well as against conviction by a petty jury; and illegal evidence can no more be used in the one case than in the other.

2. The statute in question can operate to compel testimony, if at all, only in those criminal cases where a person is called as a witness against others, or in civil cases against the witness, such as a bill against him for a discovery, where the danger that he may be made to criminate himself lies in the possibility that his evidence may afterwards be used against him in some criminal proceeding against himself. And probably the learned Judges so understood it.

3. It is important to have clearly in mind the precise terms of the proposition really advanced in the reasoning of the learned Judges below. They do not mean that the constitutional prohibition has no application except in cases of a criminal prosecution against the witness himself. This, it is believed, has never been imagined by any Judge. The learned Judges below avowedly treat it as applicable to cases where a man is called upon to testify to self-incriminating matter, no matter what the character of the proceeding, or the parties to it may be.

Their proposition must be one of these two; either, *first*, that where the witness is guaranteed by law against any subsequent *use* of his testimony in any criminal proceeding against himself, his testimony, whatever may be its character as determined by the nature and force of it, *cannot be incriminating*, because *no incriminating use* can be made of it; and he is, therefore, not compelled by being required to answer "to be a witness against himself," and the constitutional prohibition is not invaded; or, *second*, that the statute supplies a complete protection against all the perils which it was the design of the constitutional prohibition to guard against; and thus being, as it were, a full substitute for that prohibition, the latter becomes inoperative. It is submitted that neither of these propositions can be maintained.

a. We must interpret constitutional provisions according to their plain import. What makes the testimony of a witness *self incriminating* is that its *nature* is such as to tend to show that he has committed a *crime*. The circumstance that the law has made it incompetent as evidence against him does not alter, or in any manner affect, its *character*. All involuntary confessions of crime are inadmissible at common law against the persons making them *because* they are self incriminating.

The argument under notice contradicts itself. It first says that a self incriminating

statement shall be inadmissible as evidence; next, that whatever cannot be *used in evidence* to establish a criminal accusation against a man cannot *incriminate* him; therefore, that self incriminating statements are *not* self-incriminating. It must be plain that the evidence which the constitutional prohibition declares shall not be extorted from a man, is evidence which from its *inherent character*, and apart from any *use* which may be made of it, is self incriminating.

The constitutional prohibition is aimed against testimony of a certain character, and declares in effect that such testimony shall *not be brought into existence*. It does not say that it may be brought into existence and used for certain purposes, but not for the purpose of convicting its author of crime. If this had been the intention of the framers of the amendment we must do them the justice of saying that they would have known how to express it. Nothing could have been easier for them than to say that no testimony given by a witness or party in a civil suit, or by a witness in a criminal proceeding against others should be used against him.

b. The second proposition seems quite inadmissible. When the Constitution declares that something shall, or shall not be done, its mandate, in the terms in which it is expressed, must be obeyed. It is not for the legislature to make endeavors to accom-

plish the supposed purpose of the Constitution in some other way. There can be *no other way* than the one which the Constitution enjoins.

3. There is still another resort for those who would defend the decision below ; but it is quite different from that upon which the learned Judges have based their opinion. It is by going back, and asserting what, it is believed, has never yet been done, that the prohibition of the Constitution forbids only that a man should be compelled to testify in a *criminal proceeding against himself*, in the strictest sense of those terms ; and that the protection which has been accorded heretofore to *parties* when called upon to make disclosures in civil suits, and to *witnesses* testifying in criminal suits against others, against being compelled to answer self-incriminating interrogatories, has no other foundation than the common law principle, which may be altered, supplanted by a substitute, or done away with altogether. This view seems not entitled to any favor.

a. There are many authorities in the decisions of the State Courts upon the interpretation and effect of the various forms in which a similar constitutional safeguard is provided by the State constitutions. These various forms are similar to, and, indeed, for the most part identical, in substance with, that

contained in the Federal Constitution. Some of these decisions support, upon other grounds, the contention of the Government in this case; but they all unite, it is believed, in rejecting the view now under notice. It is not pretended by any of them that these various constitutional prohibitions are limited to cases of criminal prosecution against the party from whom the evidence is sought, and do not apply to cases of witnesses generally and of parties in civil actions.

People *vs.* Kelly, 24 N. Y., 74.
State *vs.* Newell, 58 N. Y., 314.
Emery's Case, 107 Mass., 172.
Cullen *vs.* Commonwealth, 24 Gratt., 624.

b. Such a view would deprive the constitutional provision of the greater part of its efficacy. It would, indeed, prevent a thing not likely ever to happen; and leave the only probable evil untouched. Surely it is not, and was not when the fifth amendment was adopted, to be supposed that accused persons would be called as witnesses against themselves in the very proceedings in which they were accused: but it was very probable that parties to civil proceedings, and witnesses in criminal proceedings against others, might be called upon to testify to matters in such manner as to furnish evidence against themselves.

The approved maxim that where the law undertakes to prohibit a thing it prohibits

every mode of accomplishing the thing, is especially applicable to constitutional enactments. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

c. It must also be borne in mind that the most frequent ways in which persons might criminate themselves would be by implicating themselves in violations of the criminal laws of the States. But a law of the United States could not prevent the use in a State Court of any testimony compelled in a Federal Court.

4. There is, indeed, one situation in which the constitutional prohibition affords no privilege to party or witness to refuse to testify, notwithstanding that the testimony sought to be elicited, when judged by its *character*, might seem to be self-incriminating. This is when, although the testimony would, at one time, have a tendency to convict its author of a crime, has *ceased* to have that character. We do not draw in question the propriety of those decisions which hold that the party or witness is not privileged when he has received a *pardon*, even if it is delivered while he is on the witness stand ; and the case where a prosecution has become barred by the statute of limitations, although somewhat different, may possibly be brought within the same

reason. In these cases the *quality of criminality* has been *taken away* from the acts concerning which the witness is called upon to testify, as much as if the law making them criminal had been repealed ; and neither the constitutional prohibition nor the common law privilege has any longer any appliction to them.

5. The entire reasoning upon which these so-called indemnifying statutes are sought to be defended rests upon most inadmissible assumptions in respect to the object and interpretation of the constitutional prohibition and to their own efficacy, and is open to the gravest question. It assumes that the *whole purpose* of that prohibition was to exempt a citizen from giving evidence which might be *directly* used to procure his conviction and punishment. A very literal interpretation of the words "to be a witness against himself" may afford some countenance to this view. but are we sure that no other object was aimed at? Can we be sure that it was not a part of the design of this constitutional enactment to save the free citizen from that *self-degradation* which is the inseparable consequence of a deliberate confession of crime? What can have a surer tendency to destroy both self-respect and the respect of others, and thus to convert a possibly good citizen into a bad one, than such a confession? Is it not better for the good of the State, if no attempt is to be made to directly

charge a man with crime and punish him for it, that he should be permitted to hold up his head among his fellows as an innocent man, and that those who may be near and dear to him may be permitted to believe that he is not stained with guilt?

And again, what is perhaps of even greater consequence, can we be sure that it was no part of the purpose of this constitutional enactment to protect the sanctity of an oath, and the interests of truth by forbidding a cruel compulsion, too severe for human nature to bear, which would often, if not generally, result in untruthful denials? As we have already intimated, human nature is prone to excuse, if not to applaud, a deliberate perjury when it seems necessary to save others, if not the witness, from deep disgrace. What could be better calculated to diminish abhorrence of the crime of perjury in any instance, and thus to enfeeble the machinery of the law for the establishment of truth, than the frequent exhibition of that crime, excusable, or excused, by the circumstances under which it was committed?

Too much caution can scarcely be employed in touching those institutions which spring from the peculiar spirit of *individual liberty* which distinguishes our civilization from every other. It is indeed a *sentiment:* but liberty in every age has stood upon sentiment, and would have been surrendered a thousand times but for that single defence. The wisest of the commentators upon our ancient law has assigned as the reason why it did not allow a default to be taken against

a defendant upon a first failure to answer a summons into Court, that it did not comport with the independent spirit of an Englishman to obey *any* command immediately! This may not be so fanciful as it seems (3 Bl. Com., 278); but it certainly does not comport with that independent spirit that a man should be called upon to overwhelm himself and family and kindred with self-degradation.

6. Did the present occasion call for it, we should confidently submit to this Court that the assumptions above mentioned upon which the *indemnifying* statutes are based, are not well founded; that the safeguard erected by the Constitution against self-crimination has the other purposes above indicated, and, consequently, that the words "be a witness against himself" should be liberally interpreted as "testifying against himself," and that a man should be deemed to be testifying against himself within the meaning of this enactment when he is declaring himself to have deen guilty of a crime, although complete immunity against its legal penalties may be accorded to him.

7. But there should be no doubt that, whatever may be the effect of completely indemnifying statutes in taking away the privilege of withholding incriminating evidence, nothing

short of such a statute can have that effect. The enactment must both *require* answers to incriminating questions, and must afford *absolute immunity* against future prosecution. Upon this point there are conflicting decisions.

a. In Hackley's case (24 N. Y., 74), the question arose upon the effect of a statute which directly required witnesses to answer incriminating interrogatories concerning the offence of bribery, differing in this respect from the Federal statute (sec. 860 R. S.) but, like that statute, forbidding the answers from being used against the witness. The idemnity offered by it was not therefore complete. The Court held, notwithstanding the claim by Hackley, the witness, of his privilege, that he was properly compelled to answer.

It was quite manifest that he might thus have been compelled to furnish information of all the particulars of the offence with the names of witnesses who could prove them, and that this would enable a prosecuting officer to subsequently procure his indictment and conviction without making any *direct* use of his own confession thus extorted from him. The language of the New York Constitution upon which Hackley based his claim of privilege was precisely the same with that in the fifth amendment of the U. S. Constitution, and it was urged that it should be liberally construed so as not only to preclude

the extortion from him of confessions which might afterwards be *read in evidence* upon an indictment against him, but also to enable the witness to absolutely refuse to answer, so that he would not be compelled to *furnish information* which might be employed to obtain evidence to convict him. It would seem to a candid mind that this claim was a very reasonable one, and that the Constitution should have been construed so that the safeguard should be equally available to prohibit the thing from being done indirectly which it plainly forbade to be done directly. "*Quando* "*aliquid prohibetur, prohibetur et omne* "*per quod devenitur ad illud.*" would seem to be directly applicable. Mr. Justice Denio drew up the opinion, which seems to the undersigned singularly wanting in the solidity of reasoning which usually characterizes the judicial utterances of that excellent Judge. The only answer he gives to the very reasonable argument above referred to is, "But neither "the law nor the Constitution is so sedul- "ous to screen the guilty as the argument "supposes. If a man cannot give evidence "upon the trial of another person without "disclosing circumstances which will make "his own guilt apparent, or at least cap- "able of proof, though his account of the "transactions should not be used in evi- "dence, *it is the misfortune of his condi- "tion, and not of any want of humanity "in the law.*"

But, with great deference, why would

not this argument be equally convincing to show the inexpediency of the general principle of protecting witnesses from the obligation of giving incriminating testimony. The fault of the witness, instead of inhumanity in the law, would be equally assignable as an answer to the objection against compelling the disclosure. If it is sound policy not to compel a witness to give incriminating evidence which may afterwards be read against him, why is it not equally a sound policy not to compel him to give the *names of witnesses* who may be afterwards called to prove his crime? This argument of Mr. Justice Denio begs the whole question concerning the object and purpose of the safeguard. We have heretofore suggested the grounds upon which it rests, and they are fully sufficient to preclude a witness from being compelled to furnish information which may supply the means of convicting him, unless an adequate guaranty is given against any such employment of them.

b. The Supreme Court of Massachusetts gave a very different answer to this question (Emery's Case; 107 Mass., 182). The case arose upon a statute of that State which, like the Federal statute under notice, provided only that the testimony should not be *used* against the witness. It is true that the language of the safeguard in the Massachusetts Constitution is somewhat wider, adding the words "or furnish evi-

dence against himself;" but, upon such a point, this difference in phraseology is hardly sufficient to materially vary the question. The Court treated almost with derision the suggestion that the constitutional safeguard was not as effective in securing the privilege to withhold information which might enable a conviction to be had, as in enabling a witness to withhold testimony which could be directly read in evidence against him. The case of Cullen *vs.* The Commonwealth (24 Gratt, 624) is to the same effect.

c. It is difficult to understand how any doubt could ever have been entertained upon this point. The animosity, deep-seated and traditional in the English civilization and law was against the practice of compelling a man to reveal his own criminality. The *mode* by which this might be done was wholly unimportant. It was the *thing*, however effected, to which objection was made. It would be utterly irrational to suppose that our ancestors had an overwhelming abhorrence of the notion that a man might be compelled to directly confess his own guilt to the end that such confession might be used in evidence against him, and at the same time regarded with indifference, or with any less abhorrence, the notion that he might be compelled to to fully reveal all the circumstances of a guilty transaction in which he had participated, with the view, not indeed of read-

ing that confession to procure and sustain an indictment against him, but to find out other witnesses by whom guilt could be fastened upon him. When they framed a *rule of law* embodying their convictions upon this point, it was a rule equally effective to prevent *all forms* of self crimination. The simple answer made in good faith, that a response to a question would tend to incriminate at once arrested the process of interrogation. And the familiar rules of interpretation require us to construe an enactment of the fundamental law intended to create a safeguard against a supposed unjust invasion of liberty, broadly and liberally enough to make it effective for its manifest purpose, unless indeed it be couched in language which does not permit such a benign interpretation.

d. Right here we may invoke with effect the decision of this Court in Boyd *vs.* The United States (*supra*). The learned Judges of the courts below, it is submitted, in holding this decision inapplicable, were influenced too much by the difference in the form of the question and the circumstances, and attended too little to the reasoning upon which the judgment of the Court was founded.

The question was whether a statute of the United States which provided a method by which the claimant in a revenue seizure case could be compelled to produce his books and papers was constitutional. It

was insisted by the claimant that the proceeding was a *criminal one*, and one against *him*, and that it involved an unreasonable search and seizure, and compelled him to furnish evidence against himself, and was thus invalid by the Fourth and Fifth Amendments.

The Court held, Mr. Justice Bradley giving the opinion, that it was a case of "unreasonable search and seizure," *although no actual search or seizure had been made, or could be made.* This decision was reached, against the dissent of two Judges, on the very ground above urged, that the prohibitions contained in the constitutional amendments designed to secure the distinguishing principles of English liberty, which had been established after long struggles should be interpreted, not narrowly, according to the letter, but broadly, according to their spirit and substance, so that their real object should be carried out.

Upon the question whether the statute was in violation of the Fifth Amendment, as compelling a man to be a witness against himself, the whole Court was agreed that it was; that although the proceeding was not strictly and technically "a criminal case," yet *in substance and spirit* it was one; that although it was not strictly and technically *against the claimant*, yet in *substance and spirit* it was against him; and that although it did not in terms compel the party to give testimony against himself, yet, as it required him under the

penalty of allowing damaging admissions to be made against him, to produce books and papers which might furnish evidence against him, it did *in spirit and substance* effect this compulsion.

We borrow—it would be idle to attempt to improve—the language of Mr. Justice Bradley :

"As therefore, suits for penalties and for-
"feitures incurred by the commission of
"offences against the law are of this *quasi-*
"criminal nature, we think that they are
"within the reason of criminal proceed-
"ings for all the purposes of the Fourth
"Amendment of the Constitution, and of
"that portion of the Fifth Amendment
"which declares that no person shall be
"compelled in any criminal case to be a
"witness against himself ; and we are fur-
"ther of opinion that a compulsory pro-
"duction of the private books and papers
"of the owner of goods sought to be for-
"feited in such a suit is compelling him
"to be a witness against himself, within
"the meaning of the Fifth Amendment to
"the Constitution, and is the equivalent
"of a search and seizure—and an unrea-
"sonable search and seizure—within the
"meaning of the Fourth Amendment.
"Though the proceeding in question is
"divested of many of the aggravating in-
"cidents of actual search and seizure, yet
"as before said, *it contains their substance*
"*and essence and effects their substantial*
"*purpose.* It may be it is the obnoxious
"thing in its mildest and least repulsive

"form; but illegitimate and unconstitu-
"tional practices get their first footing in
"that way, namely, by silent approaches
"and slight deviations from legal modes
"of procedure. This can only be obviated
"by adhering to the rule that constitu-
"tional provisions for the security of per-
"son and property should be liberally
"construed. *A close and literal con-*
"*struction deprives them of half their*
"*efficacy*, and leads to gradual depreciа-
"tion of the right, as if it consisted more
"in sound than substance. It is the duty
"of Courts to be watchful for the constitu-
"tional rights of the citizen and against
"any stealthy encroachments thereon.
"Their motto should be *obsta principiis*."

In the face of these impressive declarations what becomes of the notion that you may compel a man under oath to disclose in the fullest manner the names of witnesses and other means of convicting him of crime, provided you do not actually read his deposition against him, and that this is not, even *in substance and essence*, compelling him to be a witness against himself? Is it possible that our law will not endure that a public officer should even look into a man's books or papers, for the purpose of a criminal case, against his will, and yet that it should permit that officer to tear open his bosom and rob him of his most carefully guarded secrets to the end that with the information thus extorted, it may find other

evidence upon which to convict him of crime?

e. We are permitted for the purpose of illustration to suppose extreme cases if they are not impossible.

A man may have disclosed in a confidential correspondence with a friend the fact that he has committed a crime and has stated all the details of it, with the names of persons who were cognizant of the facts. According to the doctrine of the Courts below, you may compel him to produce this correspondence.

A man may have committed in self defence a homicide of which he is the sole witness, and, from apprehension for his safety, chooses to keep his secret. According to the doctrine of the Courts below he may be brought before the Grand Jury, upon a charge against some other person, and be compelled to reveal all the particulars of the transaction, among other things, the whereabouts of the weapon with which the deed was perpetrated. This is found, and with the aid of other available evidence, is enough to convict him. His avowal that the act was done in self defence is not credited, and he is indicted. Upon his trial the law *forbids* the reading of his deposition against him. He cannot read it on his own behalf; and while the production of the weapon with other evidence is sufficient to charge him with the crime, he is unable to establish his defence and is

convicted. It may be said that he could take the stand as a witness. This privilege is but recent and not yet universal.

If we are to compel a man to be a witness against himself, it is better to do it directly than indirectly. When his compelled testimony is actually read against him he is more likely to have the benefit of proof of circumstances which tend to his advantage.

7. We have the authority of all the cases, including those which hold what, in our view, are incomplete indemnifying statutes to be sufficient, to the effect that the protection afforded by a statute must be equally broad with that guaranteed by the constitutional provisions.

Sixth Point.—A comparison of sec. 860 of the Revised Statutes with what are above shown to be the necessary requirements of an indemnifying statute will at once show its insufficiency; and, consequently, that it furnished no ground upon which the appellant could be required to answer the interrogatories addressed to him.

1. The statute does not abolish the crime concerning which the witness may be com-

pelled to testify, not does it exempt him from prosecution for it. The offence remains in full vitality and subject to prosecution.

2. The privilege afforded by the constitutional amendment is to *stand mute*. In order to prevent his answers to the Grand Jury, should he be compelled to answer, from being read against him, he must *prove the proceeding*, prove that the Grand Jury *had jurisdiction*, and prove that he refused to answer and was *compelled* to answer.

Is it fanciful to say that these are *conditions* not imposed by the Constitution, and that they *impose terms* upon the enjoyment of its privileges? They are terms which may sometimes not be easy to be complied with.

3. The statute furnishes no protection against the *shame* and *disgrace* which confession may entail. It was at one time held that the common law rule gave the privilege to a witness when confession would thus involve him. It is said that in modern times this doctrine has been departed from. It is doubtful whether this is the case, at least where a question *directly* calls upon the witness, as it did upon the appellant, to disgrace himself. But at the time the amendment was adopted, this exemption was generally affirmed. Is it not probable that this amendment was

designed to afford this protection? Unless we can say that it was *not*, the statute must be pronounced insufficient for this reason.

People *vs.* Mather, 4 Wend., 229.
Friend's Case, 13 How. St. Fr., 17.
Respublica *vs.* Gibbs, 3 Yates, 437.
People *vs.* Nevrrick, 13 John., 82.

4. The statute affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of crime, and of sources of information which may supply other means of convicting the witness.

The constitutional privilege affords a certain protection against this peril. How can we say that this was not among its purposes?

Emory's Case, 107 Mass.

Seventh Point.—But Section 830 of the R. S. U. S. is not, and was not intended to be, an *indemnifying* statute, nor does it, or can it make any such change in the law as is imputed to it. It was passed altogether *alio intuitu*.

1. We have already shown its failure to extend to the witness the protection afforded by the constitutional prohibition. It cannot be an equivalent to that prohibition. In the

earliest of the statutes enacted for the purpose of compelling self-incriminating testimony, it is provided that there shall be *no prosecution* against the party, whose testimony has thus been extorted, or that the crime committed by him shall be acquitted and discharged.

a. Stat. of 9 Anne, chap. 14. Authorized loser at play to file a bill of discovery against the winner, *obliged* the latter to answer it, and provided that upon discov and *repayment of the money won* the party discovering should be "acquitted, *indem-* "*nified* and discharged from any further "punishment." The condition of repayment can, of course, be imposed when the privilege of the witness rests only on the rule of the common law, and is not secured by any constitutional guaranty. This statute was early re-enacted in some of the American colonies, in 1764 in Georgia, and in New York in 1768.

Such statutes are naturally confined to to those offences, which from their secrecy it is difficult to prove, such as gambling, duelling, usury and bribery.

2. Statutes of this character *intended* to compel the incriminating testimony, in every instance, it is believed, except in that of Sec. 860, U. S. R. S. in express terms *require* the witness or party to answer.

The absence of this requirement from that statute should be, of itself, conclusive evidence that Congress did not *intend* to change the law in that respect.

3. The *real purpose* of the act of Feb. 25th, 1868, Sec. 860, U. S. R. S., was to render *voluntary confessions of crime in civil cases* incompetent as evidence upon penal prosecutions against the persons making them, just as *involuntary* confessions were incompetent. This view seems to have escaped the notice of the learned Judges below.

a. That we may do no injustice to the view we are attempting to impeach, we quote from the opinion of the learned Circuit Judge.

"Under the fifth amendment a person "cannot be compelled to disclose facts be- "fore a Court or a Grand Jury, which "might subject him to a criminal prosecu- "tion, or his property to forfeiture.

"If, moreover, there be a statute which "declares that the testimony of a witness "in a case or proceeding shall never be re- "peated against him or his property in any "other case or proceeding, there is no ne- "cessity for claiming the privilege secured "by the amendment. If the protection of "860 is co-extensive with that of the Con- "stitution, a witness is entitled to no privi-

"lege under the latter. In effect, Coun-
"selman says: 'If I should answer the
"questions it would appear that I have vio-
"lated the Inter-State Commerce Law, and
"my admissions might be offered against
"me hereafter.'

"The sufficient answer to that position
"is: Should he hereafter be prosecuted for
"the offence, Section 860 would not permit
"his admissions to be proved against him."
(Record, p. 16.) And the reasoning upon which the learned District Judge placed his decision was the same. Did the learned Judges fail to remember that a prohibition to use against a witness any incriminating evidence which might have been extorted from him, quite as absolute as that which they suppose to be contained in this section 860, existed before that section was enacted, and yet never had the effect which they assign to it? Compulsory confessions could *never* be given in evidence for the very reason that they *were* compulsory. The moment the rule was established that a witness could not be compelled to incriminate himself, the necessity arose, and was at once recognized, of a supplementary rule that if, in violation of the protecting rule, incriminating evidence should extorted from a witness, it should not afterwards be used against him. According to the learned Judges below, this *supplementary* rule should have *superseded* and *displaced* the original one, and become itself the only rule in relation to the matter. In what school is this form of reasoning taught?

Surely no further argument can be needed to show the fallacy of the position of the learned Judges; and when that is shown there is no occasion for the further argument of the case; for the action of the Courts below is without pretence of defence, except such as may be derived from the extraordinary view of the effect of Section 860 of the Revised Statutes.

b. The *real command* of the immemorial common law rule as well as of the constitutional prohibition, is that self-incriminating testimony shall not be compelled, and, *therefore*, shall not be used when wrongfully compelled. In the view of the learned Judge below, the statute changed all this and declared that inasmuch as such evidence cannot rightfully be used against the party giving it, it *may* always be compelled. Surely, in respect to the constitutional prohibition, Congress was destitute of power to make such a change. It might, indeed, were it possessed of general legislative power, change the common law rule; but, before any legislation is declared to have effected any such change, it should certainly appear by *express and unequivocal language* that the change was intended. The statute in question contains no such language It does not say, nor in the remotest manner intimate, that thereafter self-incriminating evidence *may be compelled*. The effect given to it by the action of the Courts below is gathered *by implica-*

tion alone. Where are we taught that an intention to make changes in the constitution and the law vitally affecting personal liberty may be thus inferred ?

(*c.*) The error which we have ventured to impute to the learned Judges is possibly referable to an inadvertence into which one might not unnaturally fall, concerning the original purpose of this section, from viewing it as it is found in the Revised Statutes instead of its original form in the Act of Feb. 25th, 1868.

(Stat. at Large, Vol. 15, p. 37.)

The learned Judges started with the notion that this section somehow had reference to confessions in *criminal* cases. In truth it had no such reference ; or, to speak more accurately, its *main*, if not its only, concern was with confessions in *civil* cases.

It will be remembered that there has always been a practice, principally in equity, by which one party to a suit may compel his adversary to speak to the matters in issue. Answers in equity to bills and interrogatories are illustrations ; and the practice has been extended in many jurisdictions to suits at law by permitting adverse parties to be called as witnesses. Of course any person not a *party* could always be compelled to testify.

There were always certain limitations to

the right of compelling evidence in these ways in civil suits, one of which, everywhere and at all times operative, was that no person, whether party or mere witness, could be compelled to incriminate himself. In actual practice this privilege would often not be claimed, when, if claimed, it would have been allowed; and when claimed, it would sometimes be allowed, and sometimes refused, and the party or witness be compelled to answer notwithstanding the claim. Hence arose the two classes of *voluntary* and *involuntary* confessions; and when these were subsequently sought to be used, as by offers to read answers to bills in equity, or to interrogatories, or the depositions of witnesses, or notes of former testimony, if they happened to be, in the opinion of the Court, incriminating to the authors, they would be received when voluntary, and rejected, when involuntary.

We are all familiar with the results of this system. Sometimes the privilege of refusing to testify was claimed in bad faith, in order to conceal the truth and prevent the party seeking the evidence from obtaining it; and yet the claim would often be allowed in such cases. Sometimes a party would fail to claim the privilege when he lawfully might, for fear of the effect of a refusal, and give an untruthful answer in order not to incriminate himself. Sometimes both parties and witnesses would inadvertently answer without thinking that their testimony was incriminating, and, not being

conscious of having committed any offense, would fail to add such truthful explanatory matter as would prevent it from being used to their disadvantage afterwards in a criminal suit; indeed they might not be permitted to add such explanatory matter, for the reason that would not be relevant in the civil suit. It was possible to make a subsequent unfair and oppressive use of such evidence.

These results may be fairly summed up by saying that they embarrassed the discovery of the truth in civil cases without furnishing any substantial aid in the punishment of crime. A wise man would at once say: "Better give up this fancied "benefit in enforcing the criminal law by "abrogating, so far as testimony in civil "suits is concerned, all distinction between "voluntary and involuntary confessions, "and make both of them alike incompe- "tent to convict their authors of crime. "Parties and witnesses will then, although "still at liberty to claim their privilege as "before, have much less temptation to "claim it, and will often testify to the "truth, when otherwise they would refuse. "Much will thus be gained, and nothing "will be lost, except the possible oppor- "tunity of finding now and then prior "voluntary confessions of guilty parties "which may aid—often unjustly—in pro- "curing conviction."

This was precisely what was accomplished and absolutely all that was accomplished by the Act of Feb. 25th, 1868, after-

wards made Section 860 of the Revised Statutes. We cannot err in declaring this to have been its only purpose.

To convert it into an instrumentality by which the great right of protection against self incrimination, secured by immemorial law and sanctified, as it were, by constitu tional adoption, should be abrogated—and this by implication and inference—would be a monstrous perversion.

(*d.*) When the body of the statute is read together with the *title* of the original act further evidence will be found that it was intended to apply to declarations made in civil cases alone. The language through out shows that civil cases were alone con templated.

4. Mr. Justice Bradley in pronouncing the opinion of the Court in Boyd *vs.* The United States (116 U. S. p. 632) has supposed that this Act of 1868, Sec. 860 U. S, R. S. was passed in order to mitigate the objectionable features of the Acts of 1863 and 1867 which gave authority to issue warrants in revenue cases for the seizure of books and papers relating to importations of merchandise, and which Acts were in that case declared to be unconstitutional.

We cannot help thinking that he has fallen here into a misapprehension. Neither the *title*, nor the body, of the Act of 1868

makes any reference to revenue, or frauds upon the revenue, or revenue cases, or searches or seizures, or to the obnoxious Acts of 1863 and 1867. Morever, a reference to the proceedings of the Senate, in which the Act of 1868 originated, shows clearly that such was not its purpose. It was explained by Senator Frelinghuysen, who introduced it, as a bill which had been prepared at the desire of the government for the reason that in suits by the government seeking for discovery, the plea was often interposed that the discovery sought would subject the party to a criminal charge. This plainly referred to civil suits alone. Evidence of this character derived from the reports of the proceedings of Congress, while of little moment to show what the object of legislation is, against what appears, *from the face of the law*, to be the object, is, nevertheless, entirely pertinent to show that a purpose imputed upon evidence *outside* of the Act to Congress—and such appears to be the nature of the observation of Mr. Justice Bradley—was not really entertained.

a. We must, in candor, add that Senator Frelinghuysen, in answer to a question from another Senator whether it was the purpose of the bill to *compel* an answer, explained that such was the purpose; and this may be thought to invalidate our argument to the contrary. But such an effect cannot properly be given to debates upon a bill. What the *purpose* of a bill *is* must be

determined by the bill itself ; and a purpose not fairly indicated by it cannot be assumed to have been intended by the body which enacted it, because some of its members entertained it.

b. If the purpose to *compel* answers may have been entertained by some persons instrumental in framing and introducing the bill, a probable conjecture may be made concerning the motive for leaving out a direction which would have made that purpose clear, namely, a direction that the party or witness should not be privileged to refuse to answer. It would at once have drawn attention to the point whether answers could be thus compelled.

c. But these considerations in no way affect the main point now under discussion. That point is this: the decision below proceeds upon the ground that the Act of 1868 (Sec. 860 U. S. R. S.) makes it possible to compel a witness to testify where before it was not possible ; in other words, that the act changed the pre-existing law in *this* respect. The question is, did it make any such change? It is absolutely certain that it did not, and it is quite immaterial what the intention was. If there was any such intention, there was a total failure to *express* it. "*Quod voluit non dixit.*" The only change effected, or purported to be

effected, by the act, is to make *voluntary* confessions in judicial proceedings equally incompetent with involuntary ones.

Eighth Point.—Should our First Point be deemed to be not well taken, and the Grand Jury be thus held to have had jurisdiction, the order appealed from was erroneous on another ground not thus far dealt with in this discussion. Not only was the proceeding a criminal case in the strictest sense of the term, but it was also *against Counselman*, and if a criminating answer should be compelled its *use* against him could not be prevented.

1. This would, of course, not be doubted if the inquiry before the Grand Jury related to a charge against him, *by name*, of violating the law. In that case, if the charge was sustained, the Grand Jury would have pronounced *its judgment* against him; for a bill of indictment, when found, is a judgment, although one of accusation only. It is the final act of that body, and it will not be denied that the constitutional prohibition, and the common law rules are designed for protection against criminal *accusation* as well as against conviction.

2. The case must be the same, if the proceed-

ing before the Grand Jury, although not *formally* against Counselman, were really against him, or could be made use of, *as if* formally against him; and this must depend upon the answer to the question, whether this Grand Jury, upon the proceeding then before it, could have lawfully indicted Counselman, if sufficient evidence of his criminality had been given.

It seems to us clear that it could have done this Certainly nothing is more common than, when a Grand Jury finds in the course of its inquiries that a person charged is probably guilty, and that he had accomplices, to include all in the indictment, although one only was embraced in the original charge. If, according to the theory of such proceedings, the bill is first laid before them by the district attorney, there is nothing to prevent the bill from being subsequently withdrawn and amended by adding new parties, or in other ways. But, in practice, the bill is not framed until the conclusion of the inquiry, and is then made to embrace all the guilty parties.

3. It follows, therefore, that the *parties* to a criminal inquiry before a Grand Jury must be deemed to include all who occupy such a relation to the subject of inquiry that they may be indicted. Whoever *is* indicted must have been a *party;* and, consequently, whoever *may* be indicted must be viewed as a party.

4. The question then is, was it proposed to *use* the testimony of the petitioner in that proceeding for any purpose for which it was available? This question must be promptly answered in the affirmative. When the testimony of a witness is obtained before a judicial body which is material to an issue upon which that body is to decide, it is necessarily *used* the moment it is given. If it is calculated to affect the judgment of the body, it has such effect *immediately*. The taking of the testimony and its *use* are inseparable parts of one and the same act.

4. It would be wholly erroneous to say that after the testimony had been taken it lay in some manner dormant and inoperative before the jury, so far as affected the appellant until that body by some distinct resolve came to the conclusion to use it against him. If it inculpated the appellant and the jury should have affected to believe that they ought to refrain from making it the basis of any indictment against him, it would still have been entirely within their province, from the information they had thus acquired, to call other witnesses against him; and if this had been done and an indictment found, how could it be ascertained whether his own testimony had affected their minds? Would the law treat otherwise than with derision any pretense on their part that they had based the indictment wholly upon evidence other than his testimony?

The case would be precisely the same as that of the giving of illegal evidence to a petty jury upon the trial of an issue. The affidavits of all the jurors, to the effect that they had wholly disregarded it, would be insufficient to establish the fact. Indeed they would not even be considered, but would be peremptorily rejected. The only inquiry would be, "was the evidence *calculated* to affect the minds of the jurors?" This would be the law even in civil cases, and, *a fortiori*, in criminal prosecutions.

5. It may be urged that if Counselman had been compelled to answer and had been indicted he would have had a remedy in a motion to quash the indictment; and that such a motion would have been granted, even if other sufficient evidence had been given against him. But the granting of such a motion would only show that the confession ought not to have been compelled. The case seems to be the same in substance as if he had been called as a witness at the trial before a petty jury of a joint indictment against himself and others.

Moreover, the privilege secured by the Constitution of standing mute cannot be replaced by a substitute, which compels him to speak, and leaves him liable to criminal proceedings as a consequence of his speaking, from which he can escape only through the employment of a remedy, always more or less burdensome, and possibly ineffectual.

6. It is true, as we have already shown, that this statute contemplates as the subject of its prohibition, only the *subsequent* use in *criminal* cases of evidence first obtained in *civil* cases, and consequently had no application to the proceeding before the grand jury. *But those who invoke it as a defence to the action of the Courts below necessarily assert that it was applicable, and they must abide by its construction upon that assumption.*

Lastly.—The order of the Circuit Court upon the return to the writ of *habeas corpus* remanding the petitioner should be reversed and the proceeding remitted to said Circuit Court, with directions that an order be made by that Court discharging the said petitioner from custody.

JAMES C. CARTER,
Of Counsel for Appellant.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1891.

CHARLES COUNSELMAN, APPELLANT,
vs.
FRANK HITCHCOCK, MARSHAL, ETC., appellee.
No. 1026.

APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEE.

W. H. H. MILLER, and G. M. LAMBERTSON,
Attorney-General. *For Appellee.*

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APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEE.

This is an appeal from an order of the circuit court for the northern district of Illinois, refusing to discharge the appellant from the custody of the marshal under a writ of habeas corpus.

The grand jury of the district court, at the October term, 1890, was investigating alleged violations of the statutes known as the interstate-commerce law. The appellant, Charles Counselman, a large grain-dealer in Chicago, having been duly subpœnaed and sworn, was under examination as a witness before the grand jury touching alleged violations of that law. The particular acts of the railroad companies and their officers under ex-

amination were alleged unlawful discriminations by the Chicago, Rock Island and Pacific Railroad Company, the Chicago, St. Paul and Kansas City, and the Chicago, Burlington and Quincy Railway Company, and other railroad companies, in giving special rates below the regular tariff, to shippers for the transportation of freight, including grain, in violation of amended section 10 of the law, as found upon pages 857 and 858, 25 Statutes at Large.

The same section makes the act of a shipper or consignee obtaining or knowingly and willfully receiving the benefit of such unlawful discrimination a misdemeanor and subjects him to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court. Under these circumstances the witness Counselman testified and refused to testify as follows:

Question. Your name is Charles Counselman?

Answer. Yes, sir.

Question. You are the sole member of Charles Counselman & Co.?

Answer. Yes, sir.

Question. Engaged in the grain and commission business in the city of Chicago?

Answer. Yes, sir.

Question. Have you been a receiver of grain from the West during the past two years?

Answer. Yes, sir.

Question. Over what roads did you ship grain received by you during the present summer of 1890?

Answer. The Rock Island and Burlington, principally.

Question. From what States was most of the grain shipped?

Answer. From Kansas and Nebraska, I think.

Question. What did your receipts in bushels amount to of corn in the months of May, June, and July, 1890?

Answer. I have no idea; I could not tell you.

Question. Five hundred thousand bushels a month?

Answer. I can not tell you.

Question. How many men have you employed during the last year? What is the usual number of men employed in connection with your business?

Answer. I have, I think, 6 or 7 men in my office.

Question. Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago, from points outside of this State, less than the tariff or open rate?

Answer. That I decline to answer, Mr. Milchrist, on the ground that it might tend to criminate me.

Question. During the past year have you received rates upon the Chicago, Rock Island and Pacific from points outside of the State to the city of Chicago, at less than the tariff rates?

Answer. That I decline to answer on the same ground.

Question. I will ask you the same question with reference to the Burlington.

Answer. I answer in the same way.

Question. The same with reference to Atchison?

Answer. I can't recollect that we have done any business with that road.

Question. I will ask you whether you have during the last year received a rate less than the tariff rate on what is called the "Diagonal" or Stickney road?

Answer. Not to my knowledge.

Question. Who attends to the freight department of your business?

Answer. Myself and Mr. Martin.

Question. Have you or the firm of Charles Counselman & Co. received any rebate, drawback, or commission from the Chicago, Rock Island and Pacific Railroad Company, or the Chicago, Burlington and Quincy Railroad Company, on the transportation of grain from points in the States of Nebraska and Kansas, to the city of Chicago, in the State of Illinois, during the past year, whereby you secured the transportation of said grain at less than the tariff rates established by said roads?

Answer. I decline to answer on the same ground.

The refusal of the witness to answer questions as above being reported by the grand jury to the court, and the witness persisting in such refusal, he was adjudged by the court to be guilty of contempt and sentenced to pay a fine of $500, and in default of such payment to remain in the custody of the marshal till he purged himself of the contempt. Thereupon the witness, Counselman, sued out his writ of habeas corpus in the circuit court in due form, and a hearing thereon being had, the circuit court refused to discharge the prisoner and remanded him to the custody of the marshal. The case here is an appeal from that order of the circuit court.

The question for decision is whether the appellant, as a witness, was justifiable in refusing to answer questions as above set forth.

Article 5, of the amendments to the Constitution of the United States, so far as the question under consideration is concerned, reads as follows:

> No person * * * shall be compelled, in any criminal case, to be a witness against himself.

Section 860 of the Revised Statutes reads as follows:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property, or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

I.

1. A witness is not entitled to plead the privilege of silence except "in a criminal case" against himself. It will be observed that the common-law rule extends a broader privilege to the witness than the words of the Constitution. By the common-law a witness in any case in any court was entitled to refuse to answer where the answer would have a tendency to criminate him. The common-law rule was embodied in 14 and 15 Vict., C. 99, which read as follows:

> Nothing therein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, competent or compellable, to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself.

That Congress, in submitting the clause of the fifth amendment to the Constitution, quoted above, intended to limit and qualify the common-law rule, is apparent when

we examine the debates of Congress at the time it was proposed to submit the bill of rights to the people. That part of the fifth amendment discussed here, originally proposed by its author, Mr. Madison, was in the following language, and stood in this connection :

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense, *nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law.*

The debates upon this clause show that it was objected to because it "contained a general declaration in some degree contrary to laws passed, the member objecting alluding to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment to that purpose, which amendment being adopted, the clause as amended was unanimously agreed to." (Annals of Congress vol, 1, p. 782. *United States* vs. *Three Tons of Coal*, 6 Bissell, 387.)

It is therefore apparent that the clause in the Constitution limits and qualifies the common law rule. It is only "in a criminal case" that a witness can refuse to answer.

2. The investigation before the grand jury is in no sense "a criminal case." The inquiry is for the purpose of finding whether a crime has been committed, and whether anyone shall be accused of an offense. The inquiry is secret; there is no accuser, no parties plaintiff or defendant. The whole proceeding is *ex parte*, the testimony being confined to one side, and the evidence adduced is not governed by the rules or the manner or

method by which testimony is adduced or admitted on the trial of cases in court. The grand jury does not try a case, and can not make any order or judgment that in any sense concludes the defendant in any of his personal rights. The grand jury merely decides whether some person shall be put upon trial, and there is a case only when an indictment is returned. The accused is even then not in jeopardy, for jeopardy only occurs when the jury is empaneled.

Suppose the grand jury should adjourn without indicting; can it be said that a criminal case has been pending against Mr. Counselman? The fact is Mr. Counselman is only in court when the presentment is made, and then the court will see that he has the full protection of all rights guaranteed to him under the Constitution.

A reference to other provisions of the Constitution defining the rights of those accused will convince the court that this view is correct. For instance, it was provided in the Constitution of the United States, and in all of the State constitutions, that in every criminal case or proceeding the accused shall have the right to meet the witnesses face to face, and exercise the privilege of cross-examination; yet no one would contend that this gives the accused the right to appear before the grand jury and meet his accuser, although on a preliminary examination before a magistrate his right to do this would be clear. Then may we not conclude that the right of the person who claims the privilege under consideration, as well as those other rights guaranteed the accused, can not be exercised before the grand jury. This is especially true here, as Mr. Counselman was not bound over to answer

any accusation of the grand jury, and the certificate of the grand jury shows that the grand jurors were engaged solely in the investigation of alleged violations of law by railroad officials, and so far as appears in the record there was no suspicion against Counselman, except such as was raised by his refusal to answer, on the ground that he would thereby incriminate himself.

The conjecture that the grand jury might indict him on his own testimony is in violation of the presumption that the grand jury will do no more than its duty. Its duty is not to indict on incompetent testimony, and inasmuch as anything Counselman might say could not afterwards be used against him, under section 860 of the Revised Statutes, it is incompetent to indict. It is therefore to be presumed that the grand jury, under the direction of the district attorney, would refuse to make a presentment based on any disclosures which Mr. Counselman might make, either voluntarily or involuntarily. In any event, the court has ample power to protect the witness in his legal rights.

That an investigation before the grand jury is not a criminal case within the meaning of the Constitution was decided by Mr. Justice Nelson in *United States* vs. *Reed* (2 Blatch., 464).

Speaking of the method of returning indictments in England and America, Mr. Justice Nelson says:

> There the indictment is drawn by the proper officers before the case is presented for examination, and the witnesses are sworn in the particular case. Here the initiation of the proceedings is by swearing the witnesses and sending them before the grand

> jury, and the bill is drawn after they have agreed upon it. There is no cause pending in court in the legal sense of the term at the time witnesses are sworn, and in consequence no title to the proceeding can properly be given or be necessary to the validity of the oath.

Again, in the case of *People* vs. *Kelly* (24 N. Y., 75), Judge Denio says:

> The term "criminal case," used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense; but it must be a prosecution against him, for what is forbidden is that he should be compelled to be a witness against himself.

In the case of the *United States* vs. *Brown* (1 Sawyer, 535) Judge Deady says:

> I can not conceive of any one being a defendant until some distinct action or proceeding known to the law has been commenced against him, to which he then becomes a party, and in which he is entitled to be heard as soon as he is brought into court, or chooses to appear. * * * There are in fact or law no defendants or codefendants to an investigation before the grand jury touching alleged or supposed commissions of crime.

As supporting the proposition that an investigation before the grand jury is not a criminal case, it will be observed by the court that in four or five of the cases cited in this brief the witness was compelled to answer interrogatories propounded by the grand jury, notwithstanding he claimed his privilege to be excused from answering, on the ground that such answer would criminate him.

II.

Section 860 of the Revised Statutes takes away from the witness the right to refuse to answer on the ground that such answer might tend to criminate him.

The section reads as follows:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That, this section shall not exempt any party or witness from prosecution and punishment for a perjury committed in discovering or testifying as aforesaid.

The leading case in support of this legislation is *People* vs. *Kelly* (24 N. Y., 74). In that case the grand jury was engaged in the investigation of certain aldermen and members of the common council who were charged with receiving a gift of money under an agreement that their votes would be influenced thereby. One Andrew J. Hackley was subpœnaed as a witness, and in answer to the inquiry, "What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to fifty thousand dollars," the witness declined to answer, on the ground that the answer would disgrace him and would have a tendency to accuse him of crime.

The constitution of the State of New York is identical with the clause under consideration in the fifth amendment to the Constitution of the United States.

The statute upon which the court based its decision is very similar to section 860 of the Revised Statutes quoted above. It reads as follows:

> Every person offending against either of the preceding sections of this article shall be a competent witness against any other person so offending, and may be compelled to offer and give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.

The court says, speaking through Judge Denio:

> The design was to enable either party concerned in the commission of an offense against the act to be examined as a witness by the grand jury or public officer entrusted with the prosecution. The question to be determined is whether these provisions are consistent with the true sense of the constitutional declaration, that no person shall be compelled in any criminal case to be a witness against himself.
>
> The primary and most obvious sense of the mandate is that a person prosecuted for a crime shall not be compelled to give evidence on behalf of the prosecution against himself in that case. It is argued that no such narrow and verbal construction could have been in the view of the authors of the article, for the reason that no such atrocious procedure as that supposed has been tolerated in civilized countries in modern times. But constitutional provisions are not leveled solely at the evils most current at the times in which they are adopted, but, while embracing these, they look to the history of the abuses of political society in times past, and in other countries, and endeavor to form a system which shall protect the

members of the State against those acts of oppression and misgovernment which unrestrained political or judicial power are always and everywhere most apt to fall into. (See the observations of Chief Justice Spencer on this subject, reported in 18 John., 202.) The history of England in early periods furnishes abundant instances of unjustifiable and cruel methods of extorting confessions, and the practice at this day in the criminal tribunals of the most polished countries in continental Europe is to subject an accused person to a course of interrogatories which would be quite revolting to a mind accustomed only to the more humane system of American and English criminal law. It was not, therefore, unreasonable to guard by constitutional sanctions against a repetition of such practices in this State, and it is not at all improbable that the true intention of the provision in question corresponds with the natural construction of the language.

But there is great force in the argument that constitutional provisions, devised against governmental oppressions, and especially against such as may be exercised under pretense of judicial power, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed. The mandate that an accused person should not be compelled to give evidence against himself would fail to secure the whole object intended if a prosecutor might call an accomplice or confederate in a criminal offense and afterwards use the evidence he might give to procure a conviction on the trial of an indictment against him. If obliged to testify on the trial of the coöffender to matters which would show his own complicity, it might be said upon a very liberal construction of the language

that he was compelled to give evidence against himself—that is, to give evidence which might be used in a criminal case against himself. It is perfectly well settled that where there is no legal provision to protect the witness against the reading of the testimony on his own trial he can not be compelled to answer. (*The People* vs. *Mather*, 4 Wend., 229, and cases there referred to.) This course of adjudication does not result from any judicial construction of the Constitution, but is a branch of the common law doctrine which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is, of course, competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because I think, as has been mentioned, that by a legal construction the Constitution would be found to forbid it.

But it is proposed by the appellant's counsel to push the construction of the Constitution a step further. A person is not only not compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured against his answers being repeated to his prejudice on trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources

of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced.

But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man can not give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his conduct and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term "criminal case," used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against him; for what is forbidden is that he should be compelled to be a witness against himself.

Now if he be prosecuted criminally, touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It can not, therefore, be said that in such criminal case he has been made a witness against himself, by force of any compulsion used towards him to procure, in the other case, testimony which can not possibly be used in the criminal case against himself.

> I conclude, therefore, that the relator was not protected by the Constitution from answering before the grand jury.

The decision in People *vs.* Kelly (*supra*) is reviewed and reaffirmed in People vs. Sharp (107 N. Y., 441, 442, 443).

In *The State* vs. *Quarles* (13 Ark., 307) and in *Wilkins* vs. *Malone* (14 Ind., 153) like decisions were made.

The Arkansas case puts the case clearly upon principle and strongly asserts the same views set forth in the opinion of Judge Denio.

In the Indiana case the court uses the following language:

> These cases seem to settle the principle involved in the case at bar. The constitutional provision in question is thoroughly interwoven with the history and principles of the common law. It exempts no one from the consequences of a crime which he may have committed, but only from the necessity of himself producing the evidence to establish it. "It is founded upon the general sense of enlightened men, that compulsory self-accusation of crime is not only at war with the true charities of religion, but has been proven to be impolitic by the truths of history and the experience of common life."
>
> When it is provided that the answers elicited from a party in a civil proceeding shall not be used against him in a criminal prosecution for the usury, it seems to us that his constitutional privilege is fully secured to him. True, he may disclose facts that were before unknown to any officer whose duty it may be to prosecute offenses, or to any one but himself. He may disclose circumstances that may lead to a criminal prosecution. But these facts and circumstances

> can not be proven by the answers thus compelled. They must be proven entirely by other means, and the party can not be said, in any just sense, "to be compelled to testify against himself" in the criminal prosecution, because the evidence which he furnishes in the civil proceeding can in no manner be given against him in the criminal. This view is not without close analogy in the principles of the common law. Thus, where confessions have been obtained from a party under circumstances that would render them inadmissible as evidence in a criminal prosecution against him, and the confessions bring to light facts until then unknown, the facts may be proven by other testimony, although the confessions are wholly inadmissible.—Archb. Crim. Pr. (7th Ed.), 424. *The Commonwealth* vs. *Knapp*, 9 Pick., 496.

The same doctrine has been very recently reaffirmed by the same court (*Bidgood* vs. *The State.*, 115 Ind., 275.)

It will be observed that the court in New York and Arkansas reached the same conclusion independently, except that there is a brief reference in the Indiana case to the Arkansas decision. The supreme court of North Carolina upon substantially the same constitutional and statutory provisions has reached the same conclusion (*La Fountaine* vs. *Southern University*, 83 N. C., 132).

To the same effect are, *Ex parte Rowe*, 7 Cal., 184; *Higdon* vs. *Heard*, 14 Ga., 255; Wharton's Criminal Evidence, sec. 471.

The following cases have construed section 860 *supra* to hold that the witness is not protected by the Constitution from being compelled to give testimony called for, though

it might implicate him in a crime, as he is fully protected by statute against the use of such testimony on his trial:

United States vs. *Brown* (1st Sawyer, 136).

United States vs. *McCarthy* (18 Fed. Rep., 87).

United States vs. *Three Tons of Coal* (6 Bissell, 388).

United States vs. *Williams* (15 Int. Rev. Record, 199).

In re Phillips (2 Am. Law T., 154).

Judge Gresham in deciding the case, in the circuit court (44 Fed. Rep., 268), uses this language:

> Under the fifth amendment a person can not be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution or his property to forfeiture. If, however, there be a statute which declares that the testimony of a witness in a case or proceeding shall never be repeated against him or his property in any other case or proceeding, there is no necessity for claiming the privilege secured by the amendment. If the protection of section 860 is coextensive with that of the Constitution a witness is entitled to no privilege under the latter.
>
> In effect Counselman says: "If I should answer the questions it would appear that I have violated the interstate commerce law, and my admissions might be offered against me hereafter." The sufficient answer to that position is, should he hereafter be prosecuted for the offense, section 860 would not permit his admissions to be proved against him. The privilege can't be claimed when it appears that the witness has been acquitted or convicted of the offense about which he is asked to testify that he has been pardoned for it, or that it has been barred by lapse

of time, and should Counselman answer the question which he refused to answer his disclosures could never be used against him or his property in any subsequent proceeding.

It is further urged in behalf of Counselman that, should he testify before the grand jury in obedience to the order of the district court, he might disclose facts and circumstances which, although immaterial in themselves, would open up sources of information to the Government whereby it might obtain evidence not otherwise obtainable to secure his conviction, and that therefore the immunity secured by section 860 is not equal to the protection of the fifth amendment. That amendment was adopted, not to shield men from the consequences of their crimes, but that they might not be obliged to furnish evidence of their own guilt; and when the disclosures of a witness, however guilty they may show him to be, can never be repeated in any subsequent proceeding against him or his property, he is as fully protected as the Constitution intended he should be.

If, through threats of violence, a man confesses he has committed murder, and states who was present at the time, and where the weapon and the dead body may be found, and he is afterward put on trial for the offense, he can not be confronted with his confession; but the person who saw the crime committed is a competent witness, although the prosecutor might never have known there was such a witness but for the confession, and it may be shown by others that the weapon and dead body were found where the defendant said they could be found.

Judge Blodgett, also, in the contempt case, says:

The tenor of the decisions upon this particular clause of the Constitution and the last clause but one of the fifth amendment has all been in favor of re-

> quiring witnesses to testify. The question was before this court and before a large number of Western circuit courts in what is known as the "Whiskey ring" prosecutions, in 1875 and 1876, and in every case it was decided against the allowance of the privilege.

The fact that the answer of a witness may give the names of witnesses who will testify against him is no reason for not answering. Smith *vs.* The People, 20 Ill. App., 591.

It is worthy of note that in certain cases of misdemeanor the English statutes provide that not only the witness but the accused must answer, although the answer may incriminate or convict him of a crime. (See 41 Viet., C. 14.)

Section 12 of the Act to Regulate Commerce also provides:

> The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

III.

The question in issue here was not involved or decided in *Boyd* vs. *United States*.

Judge Gresham states very clearly the distinction between the cases, in these words:

> *Boyd* vs. *United States* (116 U. S., 618) is relied on as justifying Counselman in his attitude before the grand jury. That was an information against thirty-five cases of plate glass which had been

seized as forfeited to the United States for fraud against the custom laws. The penalty prescribed under the section under which the seizure was made was fine and imprisonment and forfeiture of the merchandise fraudulently entered. The information charged that the alleged fraud was committed by the owner of the goods. The owner entered a claim for the goods, and in his answer denied that they had become forfeited. It became necessary to show the quantity and quality of twenty-nine cases of plate glass previously imported by the owner, and for the purpose of doing that the district attorney offered in evidence an order which he had obtained from the district judge requiring the claimant to produce the invoice of the twenty-nine cases. The owner obeyed the order under protest, insisting that he could not be required to furnish evidence against himself, and that the statute under which the district attorney had obtained the order was in violation of the fourth and fifth amendments to the Constitution.

The invoice was read in evidence, and there was a verdict and judgment of forfeiture against the property. The statute under which the district court entered the order for the production of the invoice declared that if a defendant or claimant failed or refused to produce any book, invoice, or paper in obedience to an order of the court for its production, the allegations contained in the petition for the order should be taken as confessed. The Supreme Court held that, although the proceeding was in form one against the property, it was, in effect, against the owner for its forfeiture, and that the order of the district court and the statute under which it was made were both in violation of the fourth and fifth amendments.

This case is clearly distinguishable from the Counselman case. In the former case the owner was treated as a defendant and he was required to produce evidence upon which a judgment of forfeiture might be entered against his own goods. Counselman refused to testify in a proceeding before the grand jury to obtain evidence, not upon which he might be indicted, but upon which others might be indicted.

Judge Blodgett also points the difference as follows:

The case of Boyd was simply an information filed for the purpose of forfeiting certain imported property, which had been imported, it was charged, in violation of the custom laws, and the importer or owner of the property involved, the party claiming the property, was required, under another special section of the statute, to produce certain papers of his own bearing upon the question, as it was claimed, of the violations of the law, and the Supreme Court in the Boyd case held that the proceedings in this case was, in effect, a proceeding against the claimant, the owner of the property, and when the claimant was required, or an attempt made to compel him to produce those papers, it was in effect an attempt to compel him to furnish testimony against himself, to be a witness against himself within the meaning of the fourth and fifth amendments.

The real issue in this case, I think, the real point involved in the case, is perhaps clearly set forth in the dissenting opinion of Mr. Justice Miller, who, while he concurs in the findings of the court, also says that there was no seizure in the case at all, and it was simply an attempt to get some testimony which in the opinion of that justice would not have impinged upon either of the clauses of the Constitution invoked here or invoked in that case.

In addition to the opinions of the learned judges just quoted it is noticeable that the court in the Boyd case refers to section 860 with approval. On page 632 the court, speaking by Mr. Justice Bradley, says:

> It is proper to observe that when the objectionable features of the act of 1863 and 1867 were brought to the attention of Congress, it passed an act to obviate them by the act of February 25, 1868, Fifteenth Statute, 37, entitled, "An act for the protection, in certain cases, of persons making disclosures as parties or testifying as witnesses," the substance of which is incorporated in section 860 of the Revised Statutes. It was enacted. (Here follows section 860 of the Revised Statutes quoted above.)

The court then proceeds to say:

> This act abrogated and repealed most of the objectionable part of the act of 1867 (which was then in force), and deprived the Government officers of the convenient mode afforded by it for getting evidence in suits of forfeiture, and this is probably why the fifth section of the act of 1874 was afterward passed.

The court, in the succeding paragraph of the opinion, says:

> It has been thought by some respectable members of the profession that the two acts, that of 1868 and that of 1874, as being *in pari materia*, might be construed together so as to restrict the portion of the latter clause to other cases than that of forfeiture, and that such a construction of the two acts would obviate the necessity of declaring the act of 1874 unconstitutional.

The court, however, held that the two acts could not be construed together, and that for the purposes of the

discussion the fifth section of the act of 1874 was independent of the act of 1868.

There is certainly no hint or intimation in this opinion that section 860 was an invalid act like the act of 1874, but on the contrary, it does appear that it repealed most of the objectionable and odious clauses of the act of 1867, and the inference certainly is that in the opinion of the court section 860 is a valid, wise, and beneficent statute.

If Mr. Counselman had been indicted and put on his trial for the violation of the interstate commerce law, and the United States sought to compel him to produce his own books and papers to be used against him on trial, then such a case would be a parallel to Boyd *vs.* United States.

The difference between the cases appears to be so clear that further discussion seems unnecessary.

IV.

THE ARGUMENTS OF COUNSEL FOR APPELLANT AGAINST THE VALIDITY AND SUFFICIENCY OF SECTION 860 OF THE REVISED STATUTES ARE NOT OF CONTROLLING FORCE.

First. It is said that the grand jury can not investigate crimes against the interstate commerce law unless specially requested so to do by the district attorney, by authority and under the direction of the Interstate Commerce Commission. In the first place, there is nothing in the record to show that this has not been done, and the presumption is that the grand jury has done only its duty in the premises.

Judge Blodgett, in the contempt case, disposes of this argument as follows:

> I am not sure in the first place that that is outside of the province of the grand jury. A grand jury's functions require them to take notice of every violation of the criminal laws of the land, and if complaint is not made by some person other than the grand jury, they may proceed upon information within the breasts of the grand jurors, they may proceed upon any information set in motion with regard to the law being violated.
>
> It is entirely competent, of course, for it to be put in motion by a matter which is sent before them, or placed before them by the prosecuting officer of the Government from a committing magistrate; it is also competent for them to take notice of the results of a coroner's inquest and pursue the investigation from the standpoint that is inaugurated by that inquest, but I know of no limitation, in fact, to the scope and powers of the grand jury, or the investigations of the grand jury, except that of their territorial jurisdiction, and the grand jury in this case, when they were requested, after having investigated the matters pertaining to the ordinary business of that body in this court, they were informed that the Interstate Commerce Commission had requested that they be kept together and not dismissed or discharged for the time, until the Interstate Commerce Commission could present certain matters of the violations of the interstate commerce law, and especially cautioned that they should investigate no matter not within the territorial jurisdiction of this court, that is, the northern district of Illinois. They were not to resolve themselves into a general committee of inquiry as to whether the interstate commerce law has been violated in Nebraska or Iowa,

> or the southern district of Illinois, but entirely confine themselves to the violations of the interstate commerce law within their territorial jurisdiction, and, so far as I am advised by the district attorney, and his advice certainly is authority in a matter of this kind, I don't think they have impinged upon the rule laid down to them by the court as to the range and scope of their inquiry. (See Story on Constitution, section 1784; Revised Statutes U. S., section 813.)

Second. It is urged that the witness can not be compelled to answer, unless the exonerating statute is as broad as the constitutional privilege. In other words, that the privilege remains unless the statute grants complete amnesty.

The reason why the courts in some of the States have held that the exonerating statute must be so broad as to give the witness complete amnesty is that the constitutions of those States give the witness a broader privilege and exemption than is granted by the Constitution of the United States. For instance, in Virginia the language is: "The witness shall not be compelled to accuse or give evidence against himself," while in Massachusetts and New Hampshire the language is, "No person shall be compelled to accuse or furnish evidence against himself."

The court in 24 Grattan holds that the words "give evidence," in the Virginia constitution, mean the same as the words in the Massachusetts and New Hampshire constitution—"furnish evidence." The court in the Virginia case expressly affirmed the correctness of the ruling of the supreme court in 24 N. Y. in these words: "The terms of the New York constitution are far more restrictive than our own" (page 632). Again, on page 633: "We have

approved the reasoning and results of Judge Denio's opinion, and will add that if such a conclusion can be sustained under the very restricted terms of the New York constitution *a fortiori* it is proper under the much broader and comprehensive terms of our bill of rights."

The court in the Massachusetts case (Emery's Case, 107 Mass., 172) makes and rests on a distinction between the clause in the Massachusetts constitution and that in the constitution of New York, for the reason that the privilege granted by the constitution of Massachusetts is broader than that granted by the constitution of New York. This distinction is pointed out very clearly by Judge Dyer in case of the *United States* vs. *Three Tons Coal* (*supra*). It will thus be observed upon a careful examination of the authorities cited by counsel on behalf of Mr. Counselman, keeping in mind the difference in the language of the constitutions of the States of Virginia, New Hampshire, Massachusetts and New York, that all these decisions, instead of controverting, really sustain our position.

Third. It is also contended that section 860 is different in legal effect from the act discussed in *People* vs. *Kelly* (*supra*) and in other cases cited, because it does not in terms compel the witness to answer. The acts discussed in these cases specifically requiring the defendant to answer were doubtless passed at a time or times when parties to actions and accomplices in crime were not competent witnesses. It was therefore not only necessary to take away the privilege of the witness, but also to enact that he was competent to and must testify; but under the law as it stands to-day, except in special cases not necessary to

enumerate, every person is a competent witness and may be compelled to testify. If a witness is privileged or disqualified from giving testimony, and we pass a law taking away such privilege or disqualification, then under the general rule such witness at once becomes competent and must give evidence; and it would be useless to declare in the act removing such privilege or disqualification that the witness must answer, because he is equally required to do so without such provision. Section 860 then has the same force and effect as though it contained a clause compelling the witness to answer.

Fourth. The contention of counsel that to give the effect to section 860 of the Revised Statutes contended for by us would rob the Constitution of its force, virtue, and spirit, because, although the answers of the accused could not be repeated against him, nevertheless such an answer would afford clews and uncover circumstances that would advise the Government of other witnesses and facts that would lead to a conviction of the witness, is misleading, and has been fully met by the argument of the courts in the cases in Indiana and Arkansas, as well as in the New York and North Carolina cases cited above. The clause in the Constitution was never intended to grant immunity and exemption from crime. It certainly will not be contended that one suspected of a crime can not be called as a witness; and yet, if called and sworn, and he refuses to answer on the ground that he may incriminate himself, he thereby self-accuses and points himself out to the grand jury as a probable participant in crime. He may, by simply refusing to answer, furnish the very fact

or link that may lead to his conviction. Suspicion may then for the first time attach. There may be in the very manner of his refusal to answer, his demeanor, look, trepidation, the condition of his clothes, stains upon his hands, or marks upon his body, to which his refusal for the first time directs attention, that which will furnish a clew which will lead to his indictment and conviction.

Hence we say that the argument, if carried to its legitimate conclusion, would prevent the State from even calling a suspected person as a witness. The absurdity to which such constitutional construction would lead is well illustrated in *The State* vs. *Garrett* (71 N. C., 85). In that case it was contended that evidence obtained by compelling a prisoner, who claimed to have a hand burned in trying to save the life of the murdered person, to show her hand was inadmissible, but the court held otherwise. So in *Drake* vs. *State* (72 Georgia, 413), it was gravely insisted that it was a violation of the defendant's constitutional rights to let the jury see the bloody clothes in which he had butchered his wife, because that was making him furnish evidence against himself.

The truth is, this constitutional rule had its origin in a necessity created by mediæval cruelty; it was a revulsion against the horrors of the inquisition.

Like many other things derived from the common law the evil to which it is supposed to be directed is but the shadow of a past abuse; and it ought to be construed fairly to the accused, of course, but keeping always in mind that the day is long past when an innocent person was in danger of conviction contrary to facts, law, and

common humanity. The danger now is exactly the reverse, that guilt will go unpunished in spite of facts, law, and the public weal. Such acquittals, too often resulting from so called tenderness of the law in favor of innocence, are chargeable with a large part of prevalent lawlessness. Lynch law is the legitimate offspring of lax law. When, as recently in this District, it is held that an averment in an indictment that the victim of a murder was "then and there (in the canal) mortally strangled, suffocated, and drowned," did not import death, it would seem that either the law or the English language needs revision. Constitutional provisions as well as statutes must be construed in the light of common sense. The first amendment to the Constitution prohibits the making of any law abridging the "freedom of speech" or "of the press." The second amendment provides that the rights of the people to "keep and bear arms" shall not be abridged. Yet, the freedom of speech, the freedom of the press, and the right to bear arms are all subject to regulation.

Congress may, in the District of Columbia, impose penalties for slanderous utterances or libelous publications, and may make it a crime to carry concealed weapons, notwithstanding these constitutional provisions; and so it may require a man as a witness to testify against others accused of crime, providing such testimony shall not be used against himself, notwithstanding the possibility that, in some remote and indirect way, clues suggested by such testimony may lead to facts criminative of himself. The purpose of the law is to discover and punish crime, and

while such discovery is not to be sought through inquisitorial methods, neither are the courts bound to so construe constitutional or statutory provisions as to prevent the possibility of the wrongdoer disclosing his own guilt.

Respectfully,

W. H. H. MILLER,
Attorney-General.

G. M. LAMBERTSON,
For Appellee.

Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

CHARLES COUNSELMAN, APPELLANT,
vs.
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APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR APPELLEE.

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As the briefs of counsel for appellant were not filed until after the filing of the brief for appellee, the following suggestions are now respectfully submitted for the appellee by way of reply.

FIRST POINT.

In answer to the argument that the grand jury was without authority to make the investigation in question we have to say:

1. The report of the grand jury shows that they were "investigating and inquiring into certain alleged viola-

tions" of the interstate commerce act. From this it appears that some one had made complaint to the grand jury, and it is idle to say the investigation was based on mere rumor. In view of the presence of the district attorney who conducted the investigation and the examination of witnesses, and the statement in Judge Blodgett's opinion, rendered by him at the time he committed Mr. Counselman, that the grand jury was recalled to make the investigation in question, the proof is ample that the grand jury were not engaged in an extra-judicial inquiry. (See quotation from Judge Blodgett's opinion on page 24, original brief.)

2. Independent of these affirmative facts in the record, the power of the grand jury to conduct the inquiry finds ample warrant in section 813 of the Revised Statutes.

> SEC. 813. The grand jury impaneled and sworn in any district court may take cognizance of all crimes and offenses within the jurisdiction of the circuit court for said district as well as of said district court.

3. If the record is silent as to jurisdictional facts, the court will presume jurisdiction to exist if the grand jury could, under any circumstances, investigate the class of crimes under consideration. In a collateral attack on a judgment of the United States courts jurisdiction is presumed, although in a proceeding by error the judgment would be overthrown. (In *Skillern's Executors* vs. *May's Executors*, 6 Cranch, 267; *McCormick* vs. *Sullivant*, 10 Wheat., 192.)

> When a judgment of a circuit or district court of the United States is attacked collaterally every

intendment will be made in support of jurisdiction unless the want of it, either as to subject-matter or as to parties, appears in some proper form; and this general rule applies to judgments punishing for contempt.

In Re Cuddy, 131 U. S., 280.
Galpin vs. *Page*, 18 Wall., 350.
Kempers' Lessee vs. *Kennedy*, 5 Cranch, 173.

Ex Parte Bigelow (113 U. S., 328). Bigelow was indicted for embezzlement. The judge consolidated fourteen indictments for trial and impaneled a jury to try the accused. The district attorney made his opening statement; then the judge discharged the jury and put the accused on trial on one indictment. In the habeas corpus proceeding the accused contended, on the ground that under the fifth amendment, which prohibited anyone from being twice put in jeopardy for the same offense, the judgment of the court was void. The court refused to discharge the accused. Speaking through Mr. Justice Miller, the court say:

> This article 5 of the amendments and articles 6 and 7 contain other provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. Do all these go to the jurisdiction of the courts, and are all judgments void when they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for a crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation? It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a

nullity. But the general rule is that when the court has jurisdiction by law of the offense charged and of the party who is so charged, its judgments are not nullities.

4. Take an illustration. Suppose a bill in equity is filed on behalf of the United States to set aside a patent to public lands on the ground of fraud and mistake. Such a bill can only be filed under the direction of the Attorney-General and his authorization to commence the suit should be alleged in the bill. If, however, the suit proceed to judgment without objection, the judgment is valid until reversed. The court in a collateral proceeding will not treat the judgment as a nullity. If we were to admit that the grand jury can not enter upon an investigation of violations of the interstate-commerce act except upon the request of the district attorney so directed by the Interstate Commerce Commission, yet would the court hold, because these facts did not affirmatively appear, that its action in fining a witness appearing before the grand jury for contumacy should be abrogated while the judgment of contempt remains in full force?

5. The appellant having alleged a total want of jurisdiction must prove it. The truth of the allegation can not be left to surmise or presumption. Appellants have offered no proof. The Supreme Court have even gone so far as to say that the judgment is valid as against a collateral attack, although it affirmatively appears that the court is without jurisdiction. (*Des Moines Nav. Co.* vs. *Iowa Homestead Co.*, 123 U. S. 557.)

For further discussion of this point see page 24 of the appellee's original brief.

SECOND POINT.

In answer to the contention of counsel that the indemnity statute is not coextensive with the fifth amendment of the Constitution because it does not grant the witness complete immunity, we say:

1. The decisions upon which counsel rely are not in point, as they are based upon the phraseology of constitutions different from that of the fifth amendment. The language of the constitution of Massachusetts is as follows:

> No subject shall be held to answer for any crimes or offenses until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself.

It will be observed that the prohibition against compelling the subject to accuse or furnish evidence against himself is not confined to criminal cases, but extends to all classes of cases and to all courts and proceedings where a witness may be called to give evidence. In other words, the privilege granted by the constitution of Massachusetts is as broad as the common law rule, and more extended than the privilege guaranteed the citizen by the fifth amendment. The exonerating statute, or that part of it bearing upon the question at issue, is as follows:

> *But the testimony of any witness examined before said committee upon the subject aforesaid, or any statement made, or paper produced by him upon such examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice: Provided, however,* That no official paper or record produced by such witness on

> such examination shall be held or taken to be included within the privilege of said evidence so as to protect such witness in any civil or criminal proceeding aforesaid.

The court after discussing the question in a general way refers to the case of *The People* vs. *Kelly* (24 New York), as follows:

> But this decision was made upon the ground that the terms of the provision relied on, in the constitution of New York, protected the witness only from being compelled "to be a witness against himself," and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make. *The terms of the provision in the constitution of Massachusetts require a much broader interpretation*, as has already been indicated; no one can be required to forego an appeal to its protection unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution.

In the case of the *State* vs. *Nowell*, 58 New Hampshire, 314, the decision is based upon the provision in the bill of rights, which reads as follows:

> No subject shall * * * be compelled to accuse or furnish evidence against himself,

which is identical with the language of the Massachusetts constitution. The statute of indemnity provides that—

> No clerk, servant, or agent of any person accused of a violation of this chapter shall be excused from testifying against his principal for the reason that it may thereby criminate himself; *but no testimony*

> *so given by him shall in any prosecution be used as evidence, either directly or indirectly, against him; nor shall he be thereafter prosecuted for any offense so disclosed by him.*

This statute, it will be observed, absolutely exempts a witness from prosecution, and the court, therefore, held, as it must necessarily hold, that the statute was as broad as the constitution. Because the court in that case held that the statute was coextensive with the constitution the conclusion does not necessarily follow that section 860 does not protect the witness as fully as the fifth amendment.

In *Cullens' case* (24 Grattan, 624) the decision is based on the eighth clause of the constitution of Virginia, which reads as follows:

> Nor can he be compelled to give evidence against himself.

In this case an indictment had been laid before the grand jury charging John S. Meredith and others with the crime of murder. Dr. Cullen was called as a witness, and declined to answer, on the ground that his answer would tend to criminate him. The court, referring to the Massachusetts and New York cases, say:

> *The terms of the New York constitution are far more restricted than our own.*

The court also proceed to say:

> We *approve the reasoning and results of Judge Denio's opinion*, and will add that if such a conclusion can be sustained under *the very restricted terms* of the New York constitution, *a fortiori* it is proper under the *much broader and comprehensive terms* of our bill of rights.

The statute of immunity reads as follows:

> Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required in any prosecution against any person but himself, for having fought or aided or abetted in such duel, to testify as a witness in such prosecution: *but any statement made by such person as such witness shall not be used against him in any prosecution against himself.*

The Emery case of Massachusetts was an investigation before a committee of the Massachusetts legislature. The case in New Hampshire arose out of an investigation before the grand jury where a witness was asked whether he had sold spirituous or intoxicating liquors, and he declined to answer on the ground that he might criminate himself. (See *United States* vs. *Three Tons of Coal*, 6 Bissell, 387.)

Speaking of the Massachusetts case, Judge Doyle says:

> And so it was held that Emery, in refusing to answer the question put, was in the exercise of a constitutional right. The court refer to the case of *People* vs. *Hackley* (24 New York, 74) in their opinion. I do not understand that they intend to express any dissent to the doctrine laid down in that case; for Justice Wells says that the terms of the provision in the constitution of Massachusetts require a much broader interpretation than the terms of the provision in the constitution of New York, which, as we have seen, were identical with the provision in the Constitution of the United States.
>
> Like the statute of New York, cited in *The People* vs. *Hackley*, the statute of the United States declares that no evidence obtained from a party by means of a judicial proceeding shall be in any man-

ner used against him in any criminal proceeding. With this legislative protection, as ample as the terms of the Constitution itself, I think it can not be successfully asserted, as was done in the Massachusetts case, that the party is not as fully secured as he can be from future liability in a criminal proceeding.

2. This question is not before the court. The witness does not claim his privilege on the ground that he may furnish clues and give the names of witnesses that may lead to his conviction on testimony other than his own, but declines on the ground that his *answer* if repeated may criminate him.

The question argued with so much zeal can only arise when the witness or party refuses to answer on the ground—not that his answers will criminate him—but that his answers will open up avenues of information that will enable the prosecution to convict him without resorting to his own admissions.

The court surely will not on a false issue, not raised by the refusal of the witness to answer, declare the judgment of the district court a nullity.

The court is asked to presume that the witness can not answer without uncovering clues and supplying the names of witnesses that may lead to his conviction by testimony outside of himself. The witness has made no such claim for himself, and the court will hardly presume that the witness must necessarily furnish the prosecution with facts and the names of witnesses that would otherwise remain hidden from him.

3. A person can not be a witness against himself when the facts are proven by other witnesses, although

such facts were primarily disclosed by the witness. In other words, the claim that the witness may uncover clews and furnish the names of witnesses that may assist the Government to convict him of a crime is not within the privilege. If within the privilege, the witness may at a later stage, when called to testify on the trial either of himself or others, decline to answer. Or if he answers now, and on his own trial, if ever accused, the Government offers to prove facts derived from his testimony, although not seeking to repeat his answers, then he may object that such testimony was compulsorily obtained from him, and is therefore privileged.

The court will then inquire, as it would in cases of alleged involuntary confessions, whether such evidence was first developed by the compulsory admission of the witness, and if such be the fact, then the court will exclude the testimony. If the court would not exclude such testimony, holding that it is not privileged, is it not clear that the witness can not refuse to answer in the first instance, on the ground that answer of information would be opened up to the prosecutor that would otherwise remain hidden.

The rule has always been that the facts disclosed by an involuntary confession may be proven, although the confession is excluded.

But even in cases where the confession is not receivable in court on account of its having been obtained by means of some threat or promise, any discovery made in consequence of it may be proved, and in such a case the counsel for the prosecution is merely allowed to ask the witness whether, in consequence of something he heard from the prisoner, he found anything, and where,

etc., and the witness in answer can only give evidence of the fact of the discovery.

Archibald Prac. & Plead., 8 Ed., 399.
2 Hawk. C. 46, sec. 38.

In a note to Archibald, the rule is said to be as follows:

> Though some have thought otherwise, the later cases are uniform to the point that a circumstance tending to show guilt may be proved although it was brought to light by a declaration inadmissible *per se*, as having been obtained by improper influence.
>
> *Rex* vs. *Wilson*, Holts N. P. Rep., 598, note.
> *Charity Jackson Case*, 1 C. H. Rec., 28.
> *Tucker's Case*, 5 *Ibid.*, 164.
> *State* vs. *Moore*, 1 Hayw., 482.

This was so held where a boy, being threatened, admitted that he stole the prosecutor's bear skin and concealed it in an oven, where it was found. (*Stage's Case*, 5 C. H. Rec., 177–178.)

Therefore where a fact has been ascertained, *e. g.*, the finding of a weapon in consequence of a prisoner's confession, improperly obtained, as by encouragement to hope for a pardon, yet such fact may be shown, and also that it was ascertained in consequence of such confession, though without such ascertainment the confession would have been inadmissible.

Com. v. *Knapp*, 9 Pick., 496.
1 Leach, 300, *Warnick Shall's Case*.
State vs. *Vaigneur*, 5 Richardson, 391.

The prisoner was indicted for stealing a guinea and two bank notes for $5 each. The prosecutor was about

to state a confession of the prisoner, but admitting that he had previously told the prisoner that it would be better for him to confess. Chambers, J., who tried the case, would not allow the confession to be given in evidence, but he allowed the prosecutor to prove that the prisoner brought him a guinea and a $5 bank note, which he gave up to the prosecutor, as the guinea and one of the notes having been stolen from him, and a majority of the judges, Lord Ellenborough, Mansfield, Macdonald, Heath, Grace, Chambre, and Wood, held that the evidence was properly receivable.

R. vs. *Griffin*, R. & Ry., 150.
State v. *Motley*, 7 Richardson, 327.

On a trial for murder it appeared that two men met the prisoner and he produced some money of the deceased. They then charged him with the crime, and beat him because he denied it. They tied him and ordered him to produce the deceased's money. He then led them to a swamp and showed the residue, and acknowledged the murder and the manner of it, viz. striking on the left side with a club as the deceased rode along the right side; he dragged the body out of the road and left the club lying by it; covered the body with brush where the old road ran, about 10 or 12 yards from the present road. Sometime afterwards, about 4 miles distant, he pointed out a log not far from the road as containing the deceased's saddle bags. All these circumstances were proved to be true, and the deceased's clothes found with the bags. It was objected that the prisoner's confession, being extorted, could not be received; that the circumstances showed his knowledge, but his confession alone showed his commission of the

crime; but the court said a confession, though extorted, which relates a number of circumstances, established by proof, with which the prisoner could not well be acquainted but as the perpetrator of the crime, is admissible and may go to the jury. (*State* vs. *Moore*, 1 Hayw., 482.)

But it has been held in South Carolina that where a confession in itself inadmissible leads to the ascertainment of a fact admissible in evidence, material to the case, so much of such confession as relates strictly to the fact may be received in evidence.

State v. *Vaigneur*, 5 Richardson, 391.
State v. *Motley*, 7 *Id.*, 327.

In the case of the *Commonwealth* v. *Knapp* (26 Mass., 511), the court held:

> After the decision by which the confessions were ruled out the witness was asked on the part of the Government whether any place was pointed out by the prisoner where a weapon might be found. The counsel for the prisoner admitted that a thousand might testify that he found a weapon in a particular place, but they contended he should not state any confession of the prisoner on the subject.
>
> But the court was clear that it was competent to the Government to prove that the weapon was found in the place pointed out by the prisoner and in consequence of his direction.

4. If the Constitution had provided that any testimony of a witness or party or any information furnished by him should not be used or resorted to by the Government to convict him, then its provisions would be as broad as the contention of counsel for appellant.

That the words "shall not be compelled to be a wit-

ness against himself" have no such extended significance is patent when we consider the purpose of this amendment, the causes which led to its adoption, and the mischief it sought to remedy.

Torture had a high place in the Roman law. It was regarded with favor by the Greeks, and was practiced by all the continental countries. It never received the sanction of the common law, although it was sometimes resorted to by the courts and frequently by the crown and counsel.

In time the methods of torture or eliciting evidence by compulsion became abhorrent to the most enlightened jurists of all countries. The method of obtaining evidence by torture or compulsion was considered not only barbarous, but illy calculated to elicit the truth. In other words, if the torture or compulsion was severe enough an innocent man was as likely to confess to the crime as the guilty. The result depended almost wholly upon the force used and the strength of the nerves and muscles of the person upon whom it was practiced. Hence the court looked askance on all testimony compelled or extorted from a witness. It was considered untrustworthy and unreliable.

At the present day the courts not only rule out all involuntary confessions but, largely discredit voluntary admissions unless corroborated by other witnesses, facts, and circumstances. The reason for this rule at the time the amendment was adopted was much stronger than now. Then the defendant was not permitted to have counsel or testify. If the confession were once admitted, the defendant not being permitted to deny or explain it, conviction was sure to follow. Therefore convictions by self-accusation were regarded with

marked disfavor. The purpose of this amendment was to protect those accused from conviction on testimony tainted with suspicion, unreliability, ofttimes perjury, as self-accusing testimony is likely to be.

But the reasons for extending the amendment thus far entirely fail when under its cover it is sought to shelter a witness or an accused from incriminating facts proved by independent witnesses, although such facts were first derived from the confession of such witness or accused person. In such case the accused is not convicted upon his own testimony, which class of testimony is untrustworthy, but upon the same kind of testimony as other persons accused. If the confession is unvoluntary it is excluded, and can not be referred to. It plays no part in the court proceedings. The case is not different in any respect from that where no confession has been made.

A conviction upon such testimony is not abhorrent to our sense of justice and is not in conflict with the purpose or spirit of the fifth amendment.

Inasmuch as the reasons for stretching the amendment to the extent claimed entirely fail, the words "witness against himself" should be confined to their plain and ordinary import and significance.

5. We have but to carry the argument of opposing counsel to its logical conclusion to demonstrate its weakness. It will be admitted that the possessor of an incriminating fact may be called and sworn as a witness and the question put, the answer to which might accuse him of a crime.

The privilege of the witness being a personal one, he may waive or claim it. If he claims it, saying I decline to answer on the ground that my answer may criminate

me, he by his very refusal points himself out as a probable participant in crime. He may by simply refusing to answer furnish the very fact or clew needed to fasten the crime on him. Suspicion may for the first time attach, and the grand jury ever on the alert may perceive that the witness answers to the description of the criminal given by other witnesses. There may be in the very manner of his refusal to answer, his demeanor, looks, trepidation, the condition of his clothes, stains upon his hands or wounds and marks on his body to which his refusal for the first time directs attention that which will furnish the link which will lead to his conviction. It must be conceded that the grand jury and the prosecuting officers can use these facts thus obtained from the witness to indict and convict. He has been compelled to furnish these incriminating facts, yet it can not be said that he is a witness against himself in the sense the words are used in the amendment. Hence if the prosecution is to be debarred from using any guilty facts obtained from a witness in a court proceeding it ought to divine the real criminal and then not call and swear him.

We may then conclude that an accused person or a witness may close his mouth as to everything, and is protected from all involuntary disclosures that make *him* a witness against himself, but is not privileged to hold back any facts that make *another* a witness against him.

6. If the furnishing of clews or evidence by witnesses to be proved by independent witnesses is within the privilege, the act of February 25, 1868, is broad enough to protect the witness and exclude such evidence. The words of the statute are:

> No pleading of the party, nor any *discovery* or evidence *obtained* from a party or witness by means

> of a judicial proceeding in this or any foreign country shall be given in evidence, *or in any manner used against him* or his property or estate in any court of the United States in any criminal proceeding.

It is not plain that if the evidence or facts disclosed by a witness were obtained or furnished by him then they can not be given in evidence against him? The provision does not simply say that the *statements* of the witness shall not be repeated against him, but goes so far as to provide that no "discovery obtained from the witness shall be given in evidence *or in any manner be used against him or his property.*" The act having stated that such discovery should not be given in evidence, why were the words "or in any manner be used against him" added except to absolutely protect the witness from all disclosures or discoveries, whether sought to be proved by the witness' own admission or in any other manner? This is shown when we consider the purpose of the act, which the Supreme Court in the Boyd Case say "abrogated and repealed the most objectionable part of the act of 1867 (which was then in force), and deprived the Government officers of the convenient mode afforded by it for getting evidence in suits of forfeiture."

The act of 1867 referred to in the above quotation from the decision in the Boyd Case authorized any district court to issue a warrant to the marshal commanding him to make search and seizure for invoices, papers, and documents that could be used as evidence in a proceeding to condemn or forfeit goods that had not paid the customs duties imposed by law. Such papers once in the hand of the prosecuting officer of the Government,

and the facts learned, acquired or extorted by this unwarrantable invasion of the rights of the subject secured by the Fourth and Fifth Amendments, could be proved by independent means without referring to any statement of the owner of the goods. Hence the act states in the broadest terms that no "discovery or evidence *obtained* from a party or witness shall be given in evidence or in any manner used against him." That the scope of the act is as broad as here stated will appear more clearly from the debates upon the bill in the Senate, hereafter referred to.

7. The contention of counsel that the section under consideration only protects witnesses and parties making voluntary disclosures finds no warrant in the words of the statute. "No pleading or any discovery or evidence" is the language of the act, hence the interpolation or prefixing of the word "voluntary" is entirely gratuitous. If the act in question was passed, as the Supreme Court say, in the Boyd Case, to remedy the mischief occasioned by the act of 1867, under cover of which the officers of the law intruded into the houses of persons, broke open their closets, and ransacked their desks, thereby forcing and compelling suspected persons to surrender evidence of their own guilt, then the provision in question was enacted for the specific purpose of protecting witnesses from involuntary disclosures, or from evidence which they were compelled to yield to the Government.

It is to be further observed that voluntary admissions before the statute were always admissible in evidence against an accused. Congress could have no object in declaring that a *voluntary confession* made in one judicial proceeding should not be used against such a per-

son in a subsequent criminal action. When we consider the purpose of the act the argument is all to the effect (as stated by Senators Frelinghuysen, Trumbull and Davis) that the statute is limited to *involuntary disclosures*. If, however, the statute bars the use of voluntary disclosures then it is much broader than the Fifth Amendment. That amendment sought only to preclude the use of involuntary testimony, while the act in terms excludes both voluntary and involuntary admissions. Instead of invading, it adds to the guaranties of the Constitution. It is a new safeguard for individual rights and liberties. Instead of being the subject of unmerited opprobrium, it deserves to share in the tribute of admiration so lavishly bestowed upon the Fifth Amendment.

The comments of members of Congress at the time the bill was before the Senate is instructive on this point. (See Senate Proceedings, Fortieth Congress, Part I, p. 950.)

Senator Frelinghuysen, in introducing the bill, said:

> The object of the bill is to relieve parties in making disclosures and witnesses testifying from subjecting themselves to forfeitures and penalties. The Government finds it necessary that some such bill should be passed, as where they seek a disclosure parties plead the fact that it will subject them to forfeitures and penalties, and so the Government are deprived from getting such evidence as it is essential for them to have. It only applies to courts of the United States.

Senator Trumbull, in commenting upon the bill, said:

> I understand courts of chancery may compel a discovery from the party. They have that au-

thority under their general chancery power. That being so a party comes in and gives as a reason why the court should not compel the discovery, that the discovery, if made, would subject him to pains and penalties.

* * * * * * *

This bill proposes that he shall not be excused from testifying on the ground that the answer might be used against him in a penal proceeding or a criminal proceeding. Of course the court would compel him to answer if it was a proper case.

Senator Davis said:

I understand the bill is based upon the common-law principle that no man should be compelled to give evidence against himself in criminal and penal cases. I hold that this is the intention upon which this bill has been introduced. I understand the immunity which it gives to an individual is this, that when he is compelled to make a disclosure in giving evidence, or in written pleadings, where he is compelled by the law and the words of the proceeding in court to give evidence involuntarily, any disclosure he makes shall not be used against him in any criminal or penal prosecution or any suit that is quasi penal.

Mr. TRUMBULL. That is the object of it.

Senator DAVIS. That is a correct principle. It is one that has been embodied in the laws of Kentucky, with which I am familiar, for a great many years, and I think the provision of this bill is a very proper one. A party defendant is required to answer; and if he stand out and does not answer he is in contempt of court. He may be compelled to answer, and when he is compelled to answer, and in his answer discloses facts that would operate prejudicially to him in a penal or quasi penal prosecution, those disclosures are not to be used as testimony against him. That is the whole of it, and I take it to be a very proper exemption.

It is also claimed that the statute only applies to voluntary admissions given in *civil cases*. There is certainly nothing in the language of the act to sustain this assertion. The statute declares that no discovery or evidence of a party or witness obtained in *a judicial proceeding* can ever be used against him. Have the terms "evidence" and "judicial proceeding" only a place in the vocabulary of civil law? What warrant is there for limiting those words to civil actions? We might with as much reason argue that the act was only intended to apply to criminal proceedings. If Congress intended to limit the act to disclosures and evidence obtained in civil causes it would have been very careful to say so, and would not have used the words, "judicial proceeding." The framers of the law had no difficulty in using an apt term to enumerate the class of actions and proceedings from which this class of testimony is excluded. Congress accordingly declared it inadmissible in "criminal proceedings." Is it not evident from the use of the word "criminal" in the concluding sentence of the act, that if it had been the intention of Congress to confine the application of the words, "nor any discovery or evidence" to civil proceedings, that the words "civil proceedings" would have been used instead of the words, "judicial proceeding?"

Counsel are not expected to be consistent, and we can therefore understand how the distinguished counsel are able to contend that the words "criminal case" used in the fifth amendment may be *stretched* to include an inquiry before the grand jury while also asserting that the words "judicial proceeding" must be *shrunk* to mean "civil action." Whether the investigation before the grand jury was a "criminal case" or not, it most certainly was "a judicial proceeding."

8. Counsel for appellant contend that section 860 of the Revised Statutes is not broad enough because it does not extend complete immunity to the person of the accused. If the court should take this view it would not only overthrow the act of 1868, and a similar provision in the act to regulate commerce between States, but also a like law applicable to testimony given before the various committees of Congress which has been in force for a third of a century. It is very doubtful whether Congress has the power to pass a law granting a pardon or immunity to one who has committed a crime. It would seem clear that such legislation is not warranted by the Constitution of the United States. The power and duty are devolved upon the Executive "to take care that the laws be faithfully executed," and there is confided to him in express terms the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This power has no other limit than its nature implies. The Executive may exercise it before as well as after the conviction of the offender, and upon such conditions as seem to him for the public good, and, as has been frequently held by the Supreme Court, it can not in respect of substance be controlled by legislation.

In *United States* vs. *Klein* (13 Wallace, 147) the court say:

> To the Executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences.

In *Ex Parte Garland* (4 Wallace, 380) the court say:

> The power thus conferred is unlimited with the exception stated. It extends to every offense known

> to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions.

This whole question of the power of Congress to pass such an act as counsel for appellant claim must be enacted before the privilege of a witness is removed was fully discussed in a report made by a majority of the Judiciary Committee of the Senate of the United States on the 11th day of April, 1876. The bill under consideration was House bill 572, entitled "An act to protect witnesses who shall be required to testify in certain cases." The act provided in substance that any witnesses compelled to testify before any committee of Congress should be granted complete immunity from prosecution. The majority of the Judiciary Committee, composed of George F. Edmunds, Roscoe Conkling, Frederick T. Frelinghuysen, George G. Wright, and Timothy O. Howe, made an elaborate report to the effect that such an act was not within the legislative power of Congress. (See Report 253, First session, Forty-fourth Congress.)

We quote from the report of the committee:

> We do not think it necessary to amplify discussion upon the bill as it was sent to the committee. It is so objectionable and dangerous that the committee are all of the opinion that it ought not to become a law as it stands. But in view of the fact that the coördinate branch of the legislative de-

partment of the Government, whose opinion is entitled to the highest respect, has thought some legislation upon the subject necessary, the committee have considered the following proposition submitted by one of its members as in general the best substitute for the bill, if any such general legislation can be found constitutionally rightful or expedient, namely:

"That whenever any person shall be called to testify before either House of Congress, or any committee thereof, or before any joint committee of the two Houses, touching any charge of malfeasance, misfeasance, or corruption of any public officer, clerk, or employé of the United States, or of any department of the Government, or any Senator or Representative in Congress; or touching any charge of bribery, or attempt to bribe any such officer, clerk, or employé, Senator, or Representative; or before the Senate of the United States when sitting as a court of impeachment; and the person so called to testify shall refuse or decline to answer any question put to him upon such inquiry, investigation, or trial, on the ground that his answer would or might criminate, or tend to criminate him, or might subject, or tend to subject him to some penalty, forfeiture, or criminal punishment; and the witness shall, nevertheless, be required, by either House of Congress or by the Senate sitting as a court of impeachment, to answer the question or questions put to him; and he shall thereafter truly and fully answer such questions, and make a true and faithful discovery and disclosure of all matters within his knowledge pertaining to the subject under investigation by either of the committees aforesaid, or by either house aforesaid, or by the Senate sitting as a court of impeachment, then, and in such case, such witness shall not be held to answer, criminally, in any court of justice, or be subject to any penalty or forfeiture on account of any fact or act concerning which he shall have been required to

testify as aforesaid, and he shall be entitled to a certificate from the President of the Senate or the Speaker of the House setting forth the facts aforesaid, which certificate he may plead in bar of any indictment or prosecution in any court of the United States for any fact or act concerning which he shall have testified as aforesaid, and such certificate shall be admitted in evidence as proof of the truth of such plea, and the plea, when proved, shall constitute a valid defense to such indictment or prosecution: *Provided*, That nothing herein contained shall be so construed as to exonerate such witness from criminal prosecution and punishment for any perjury committed by him in giving his testimony as aforesaid."

The committee, after the most patient and careful consideration, are of the opinion that this proposition is wholly inadmissible.

It is proposed to declare by permanent law that any person who, refusing to testify before either House of Congress, on the ground that his answer might tend to criminate himself, shall by either House be required to testify, and shall accordingly testify, truly touching any charge of malfeasance, misfeasance, corruption of, or bribery of, or attempt to bribe, any officer, clerk, or employé of the United States, or any member of Congress, such person so testifying shall be thereby discharged from all criminal liability in respect of any act or fact concerning which he shall have been so required to testify.

It will be seen that the enactment would operate only upon persons who at the time of giving their evidence were criminally guilty of some one or all of the crimes above named, or others referred to the testimony concerning them. And as to such persons, each House of Congress on its sole authority, and in its sole discretion, is authorized to say that they shall not be amenable to the law for such offenses.

This it appears to us is nothing other than a legislative declaration of pardon of all such criminals, of the classes named, as shall be selected by either House. It is natural to presume that the refusal to testify upon the ground of criminal exposure would of itself excite and stimulate curiosity or desire on the part of either House for a full disclosure, and that in every case of such refusal, the witness yielding to the demand for further testimony would acquire the immunity from punishment for his own misdeeds which he must so much desire.

The question at once arises, is such legislation warranted by the Constitution of the United States?

The power of Congress is not, like that of the British Parliament, generally and substantially omnipotent. All the powers of our Government are limited to specific subjects, and measured methods, named in a written constitution. No power not delegated exists. And in respect of the powers delegated, the fundamental principles of the framework of our Government, as well as the form of the Constitution, require and create a clear and absolute division and separation of powers.

The legislature is to make laws that shall provide for the punishment of all crimes of each class and kind, equally, and without any exception or reservation that does not apply to all offenders alike, either as to time, place, or person. It must, indeed, define offenses and affix their punishment, but it can not provide that the same offense once committed by two persons shall as to one be punished, and as to the other not, according to the discretion of either branch or the whole of the legislative power.

It is the exclusive province of the judicial power to try and determine the guilt or innocence of persons supposed to have violated the law, and to pronounce the sentence affixed by law to the offense.

The power and duty is devolved upon the Executive to "take care that the laws be faithfully executed." And there is confided to him in express

terms the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This power has no other limit than its nature implies. The Executive may exercise it before, as well as after, the conviction of the offender, and, upon such conditions as seem to him for the public good; and, as has been frequently held by the Supreme Court, it can not, in respect of substance, be controlled by legislation. And it has been intimated by that high authority that it includes what has been known in political history as amnesty, although it may be questioned whether amnesty does properly fall under the designation of pardon, and rather to grant it is not a political power that may, in respect of subjects to which it applies, be exercised by the legislative departments of the Government?

In the convention that framed our Constitution the subject of pardons appears to have received careful consideration. It was proposed that the Executive power to grant pardons should only be exercised "with the consent of the Senate," which was negatived by a vote of eight States against one. Then it was proposed to limit the Executive power to pardon "after conviction." To this it was objected "that pardon before conviction might be necessary in order to obtain the testimony of accomplices," and thereupon the proposition was withdrawn. Still later, it was proposed to except from the Executive power of pardon cases of treason, on the ground that the President himself might be guilty, and that traitors might be his own instruments; to which it was replied that it would be better that "there should be no pardon for treason than let the power devolve on the legislature." And it was urged that the power was best placed in the hands of the Executive; that if he were himself a party, he could be impeached and punished; and that it would be inconsistent with the constitutional separation of the executive and legislative

power to let the prerogative be exercised by the latter; that a legislative body is utterly unfit for the purpose; that they are governed too much by the passions of the moment. This argument was enforced by the instance of the outbreak in Massachusetts, of which it was said that "one assembly would have hung all the insurgents in that State; the next was equally disposed to pardon them all." On the force of these objections the convention refused to except cases of treason, by a vote of eight States to two. (Elliot's Debates, vol. 5.)

All the three before-mentioned classes of powers were studiously separated in the Constitution, and none of them, so far as the committee is advised, were conferred concurrently upon different departments of the Government. Does it not follow, then, that the legislative department has not the power under the Constitution to grant pardons? And it is clear that if it has not the power to do so directly, it has not the power to do so indirectly, or by delegation. It is, indeed, manifest that the power of pardon delegated to either branch of the legislative department, acting separately, would be threefold more dangerous than its exercise by the legislative power, which can only act by the concurrence of the two branches, and usually with the approval of the Executive.

It may be admitted that the legislative power may, in general, pass whatever laws are necessary or incidental to the administration of justice, or to the exercise of any of the powers granted by the Constitution; but in so doing it can not invade the powers of any other department. If it were otherwise, it could absorb the functions of all the departments of the Government, and destroy the Constitution by the legitimate exercise of the very powers granted to preserve it.

If the legislative power can say that A shall not be punished for a crime if he give evidence, can it not also say that he shall not be punished if he will

lend money to the United States? for the power to borrow money is as broad as the power to provide for the administration of justice; and the means employed are no greater or different encroachment upon the pardoning power in the one case than in the other.

The Constitution confers the power to grant pardons upon the Executive; does it also confer it upon the legislature?

A pardon is correctly defined by the Supreme Court to be "an act of grace proceeding from the person intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed." It may be granted before conviction as well as after, and upon any conditions considered by the pardoning power to be appropriate. In its nature, substance, and form it is an exemption of the individual upon whom it is bestowed from the punishment the law inflicts for the crime he has committed. And whenever this exemption is referred to by law writers, or in statutes in connection with Parliamentary proceedings in Great Britain, it is usually and naturally styled, although bestowed by the legislature, a pardon. (Blackstone's Commentaries, Sharswood's edition, chapter 4, 330, and note; *ib.*, 400, and note.)

It is precisely this, neither more nor less, that the proposed law is to do. It is to declare that the guilty person "shall not be held to answer in any court of justice or be subject to any penalty or forfeiture," etc., for the crime he has committed. The definition of the Supreme Court above stated and the sentence just quoted are exact equivalents.

It appears to us, then, that, beyond just dispute, the scheme under consideration proposes to grant pardons for municipal offenses by an act of legislative power, or else to delegate the power to grant such pardons to each House of Congress, and to substitute the certificate of the President of the

Senate or the Speaker of the House of Representatives for the sign-manual of the President of the United States.

That in whatever language a statute may be framed its purpose and constitutional validity must be determined by its nature and reasonable effect, is not only a just rule of interpretation, but is the settled and unanimous judgment of the Supreme Court. (*Henderson* vs. *Wickham*, October term, 1875.)

And it is equally clear in reason and well settled by authority that the law-making power can not, in aid of the execution of its constitutional duties or of the exercise of its constitutional powers, make use of any means not also within its constitutional power.

Congress may regulate commerce, but it can not make a treaty with a foreign power, however needful a treaty may be to the due regulation of commerce. It may coin money, and to that end may establish a mint, with such officers as it deems proper, but it can not appoint or remove any one of the officers so provided for, however essential it may be that a total change in the management of the mint shall be effected.

So Congress, by either of its Houses, may make investigations into the administration of all branches of the Government, but, for that purpose, it can not appropriate any of the powers belonging to the Executive or the judiciary. It is not enough that the means resorted to are naturally appropriate, they must be constitutionally appropriate, and, to be so, they must not be taken from the mass of powers confided to the Executive or the judiciary.

If Congress, in the choice of means for the exercise of its admitted powers, can borrow executive power, so the Executive in the same way can appropriate legislative power whenever it may be naturally convenient to the discharge of his constitu-

tional duties—a power that no one, we think, will admit.

Mr. Madison, in No. 46 of the Federalist, states the point as follows: "The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of the third, can try and condemn all the subordinate officers in the executive department."

Upon these considerations, thus briefly stated, and others incidental and collateral, we think it at least open to great question whether the power of pardon, which we think includes all indemnity against punishment for committed crimes under the Constitution, rests, in any degree, in the legislative department of the Government. Beyond this we need not go at this time.

9. It is further to be remembered that if a witness participating in crime testifies compulsorily, but in good faith, for the Government, making a clean breast of the whole crime, he certainly has an equitable claim on the President for a pardon independent of the statutes. This claim, it seems to me, exists whether the district attorney promises immunity or not. If the Government demands that a witness testify in its behalf and use the court as an instrument to compel such testimony, it is equitably bound to extend such witness mercy or immunity.

Such has always been the practice of the Government and I venture that no case exists where a prosecutor has used the testimony of an accomplice that he has then turned upon and prosecuted him, unless an agreement had been entered into with the accused beforehand that he should receive a mild punishment. (*Whisky Cases*, 99 U. S., 594.)

That the operation of the statute in its practical workings has not been prejudicial seems reasonably clear from the fact that this statute has been in force twenty-three years without having been questioned before this high tribunal, although it could have been brought here at any time. In every case like this you have to meet not only the consequences that must follow the enforcement of the law, but the imaginary results that the fertile fancy of counsel may conjure. The fact that in all these years there has been no case of oppression, no cruel punishment inflicted for the purpose of extorting testimony, is both a tribute to the law and an answer to the groundless fears that have a place only in the minds of astute counsel.

The days of torture, with its horrid instruments, the rack, the thumb-screw, and the languishing fire, are gone forever. They have vanished into the misty past, never to return. It is idle to refer to them to enforce an argument in this enlightened day and age. In a time when criminals are escorted to prison by troops of friends, when they are smothered with flowers, fed on the richest viands, and laid on the softest couch, there is little occasion to emphasize the atrocities of Torquemada or the arbitrary proceedings of the star chamber.

The object of the amendment is not to screen the guilty, to protect the criminal, and prevent his conviction, but solely to exempt the accused from being a witness against himself. The Constitution confers the power on Congress to enact laws and devise means of every kind and character to bring criminals to justice so long as the personal rights of the subject are not invaded or abrogated. The purpose of the Constitution to protect the

public by punishing criminals runs parallel with its purpose to protect the citizen in his guarantied rights.

It is within the power of Congress, as it is its duty, to enact laws that will facilitate the conviction of criminals so long as the rights of those accused are not imperiled. Hence when counsel for Counselman declaim so vehemently about the sacred rights of those accused it is well not to forget that the punishment of criminals, the vindication of law, and the protection of the public are not of secondary importance.

The amendment was not adopted from a sedulous desire to cover up crime or screen the guilty. It is to be presumed that the framers of the amendment, the Congress that submitted it, and the people that ratified it sought only to prevent an accused from being convicted on his own evidence, but did not intend to put a stone in the way of securing a conviction on independent testimony.

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